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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 718

CONRAD, RUBIN & LESSER, PETITIONERS,

vs.

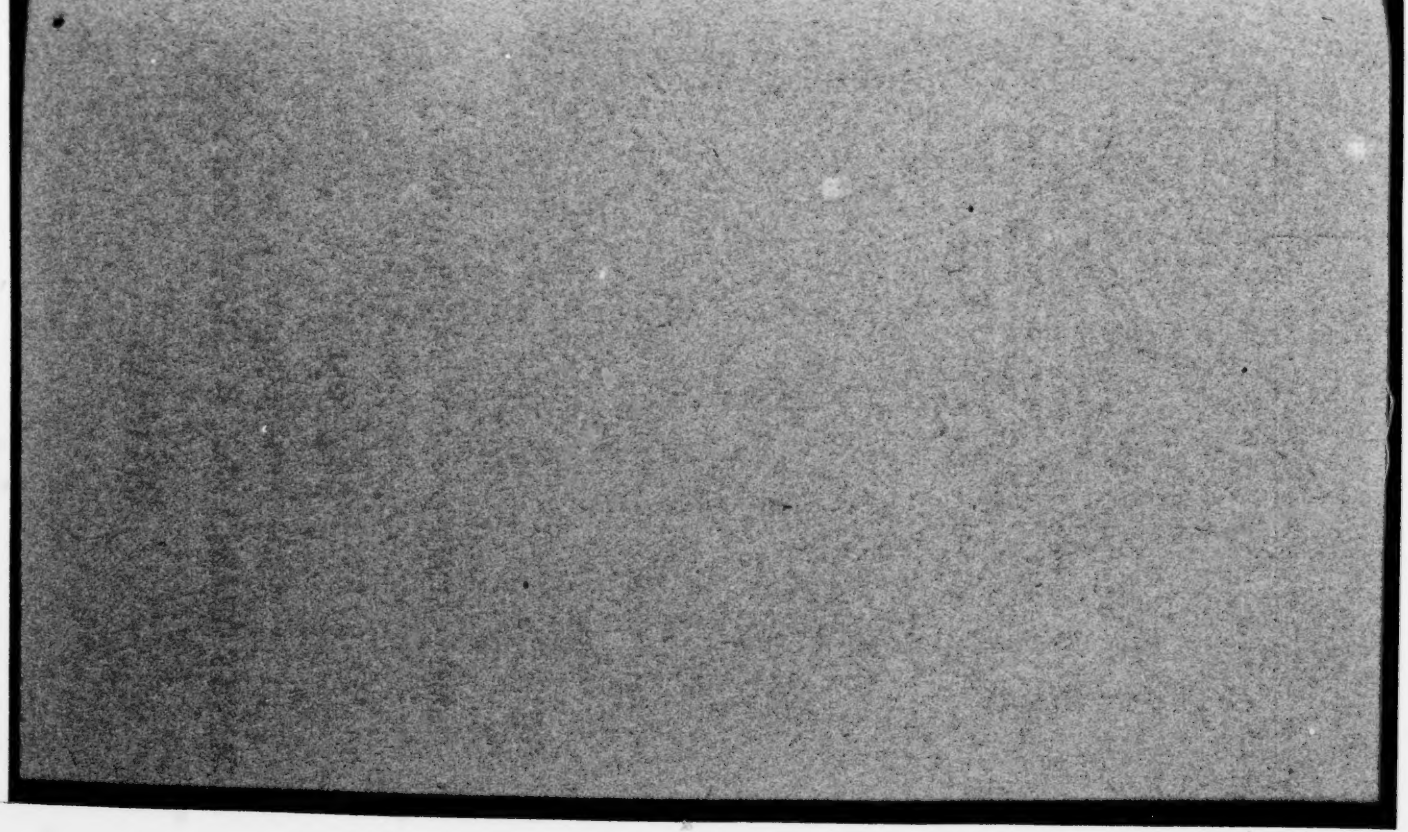
HORACE G. PENDER, TRUSTEE IN BANKRUPTCY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 21, 1933

CERTIORARI GRANTED MARCH 27, 1933

(37,415)



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IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

In the Matter of DAVID BELL SCARVES, INC., Bankrupt; CONRAD, RUBIN & LESSER, Appellants

STATEMENT

This is an appeal from an order of the United States District Court for the Southern District of New York, signed by District Judge Francis G. Caffey, on October 1, 1931, confirming the order of Hon. Oscar W. Ehrhorn, Referee in Bankruptcy, directing the appellants to turn over to Horace G. Pender, as Trustee in Bankruptcy of the estate of David Bell Scarves, Inc., the sum of $2,000.00, as property of the said bankrupt estate, and dismissing appellants' petition to review.

This proceeding was commenced on or about June 1, 1931.

The appellee is Horace G. Pender, Esq., as Trustee in Bankruptcy herein.

There has been no change in parties since the commencement of this proceeding.

The Trustee's notice of motion and petition to reexamine attorneys' fees were filed June 22, 1931.

[fol. 2] The cross-notice of motion of the appellants was filed June 22, 1931.

The said motion of the Trustee and the said cross-motion of the appellants were heard on June 22, 1931, and on July 23, 1931, by Hon. Oscar W. Ehrhorn, Referee in Bankruptcy.

The hearing on the appellants' petition to review was held before Hon. Francis G. Caffey, District Judge, on September 16, 1931.

No question was referred to any commissioner or commissioners, master or referee, except as herein stated.

The order appealed from, confirming the order of Hon. Oscar W. Ehrhorn, Referee in Bankruptcy, and dismissing the said petition to review, was entered on October 1, 1931.

The appeal herein was taken on October 31, 1931.

[fol. 3] IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

In the Matter of DAVID BELL SCARVES, INC., Bankrupt; CONRAD, RUBIN & LESSER, Appellants

ORDER ALLOWING APPEAL—NOV. 16, 1931

A motion having been made herein by counsel for the appellants for leave to appeal from a certain order of the District Court, dated October 1st, 1931;

Upon consideration thereof, it is

Ordered, that said motion be and hereby is granted.

Wm. Parkin, Clerk.

[fol. 4] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

In Bankruptcy. No. 49939

In the Matter of DAVID BELL SCARVES, INC., Bankrupt

NOTICE OF MOTION BY TRUSTEE

SIR: Please take notice that upon the annexed petition of Horace G. Pender, as Trustee herein, duly verified the 29th day of May, 1931, and upon all the pleadings and proceedings heretofore had herein, a motion will be made before Hon. Oscar W. Ehrhorn, Referee in Bankruptcy, at his offices, No. 280 Broadway, in the Borough of Manhattan, City of New York, on the 8th day of June, 1931, at 3.00 o'clock in the afternoon of said day, or as soon thereafter as counsel can be heard, for an order under §§ 60d and 67e of the Bankruptcy Act to re-examine the payment of $2,500.00 by David Bell Scarves, Inc., the bankrupt herein, to Conrad, Rubin & Lesser, attorneys, and for an order directing the said attorneys to turn over to your petitioner, as Trustee, the sum of $2,500.00, or such portion thereof as the Court may deem proper, as part of the assets belonging to this estate and for such other and further relief as

to the Court may seem just and proper in the prem-
[fol. 5] ises.

Dated New York, May 26, 1931.

Yours, etc., Krause & Hirsch, Attorneys for Trustee, 225 Broadway, Borough of Manhattan, City of New York.

To Conrad, Rubin & Lesser, Esqs., Respondents, 150 Broadway, Borough of Manhattan, City of New York.

In United States District Court

[Title omitted]

Petition to Re-examine Attorney's Fees

To Hon. Oscar W. Ehrhorn, referee in bankruptcy:

The petition of Horace G. Pender respectfully shows and alleges upon information and belief:

[fol. 6] As and for a First Count

First. That this is a proceeding pursuant to § 60d of the National Bankruptcy Act of 1898 and the amendments thereto to re-examine a transfer of property by David Bell Scarves, Inc., bankrupt, to Conrad, Rubin & Lesser, attorneys at law, and to determine whether or not the said transfer of property as and for attorneys' fee in contemplation of bankruptcy was reasonable or not, and if unreasonable, to direct the return of any excess thereof for the benefit of the estate.

Second. That on or about the 15th day of December, 1930, your petitioner was duly elected Trustee in Bankruptcy of the above-named estate, thereafter duly qualified and has been and is acting as Trustee of the said estate.

Third. That on or about the 17th day of November, 1930, an involuntary petition in bankruptcy was duly filed in this Court against David Bell Scarves, Inc., a New York corporation, praying that the said corporation be adjudicated a bankrupt.

Fourth. That thereafter and on the 21st day of November, 1930, the said corporation was duly adjudicated a bankrupt in this Court.

Fifth. That prior to the filing of the said petition in bankruptcy and on the 5th day of November, 1930, the said bankrupt did transfer to Conrad, Rubin & Lesser, attorneys at law, the sum of $2,500.00, the property of the bankrupt, as compensation for legal services to be rendered by the said attorneys for the said David Bell Scarves, Inc.

[fol. 7] Sixth. That at the time of the said transfer, the said bankrupt was in financial difficulties and unable to meet its maturing obligations and that by reason thereof the said bankrupt, on the 29th day of October, 1930, called a meeting of its creditors for the purpose of determining what action, if any, should be taken in connection with its affairs and commenced at the said time negotiations with its said creditors for a settlement of its indebtedness at a sum substantially less than 100% of its liabilities.

Seventh. That prior to the calling of the said meeting of creditors, the said bankrupt on the 23rd day of October, 1930, retained one Edward M. O. Pratt, an attorney at law, for the agreed price of $2,000.00 to represent the said bankrupt in endeavoring to effect a settlement with its creditors. That pursuant to the said retainer, on the same day it paid to the said attorney on account thereof the sum of $750.00.

Eighth. That while the said negotiations were pending, David Bell, president and owner of the business, withdrew therefrom for his own use and benefit the sums below mentioned on the dates indicated:

October	21,	1930	$500.00
"	28,	"	600.00
November	1,	"	150.00
"	5,	"	250.00
Total			$1,500.00

Ninth. That while the said negotiations were pending, Israel Bell, a brother of the said David Bell and an employee of the said bankrupt, withdrew from the said com-
[fol. 8] pany the amounts below stated on the dates indicated:

October 23, 1930	$500.00
" 28, "	100.00
November 1, "	150.00
" 11, "	150.00
Total	$900.00

Tenth. That on or about the 17th day of November, 1930, pursuant to order of Hon. Robert P. Patterson, one of the Judges of this Court, the Irving Trust Company was duly appointed Temporary Receiver in Bankruptcy of the assets and effects of the above-named bankrupt. Thereafter it duly qualified and took possession of all of the tangible property of the said bankrupt.

Eleventh. That the total assets that came into the possession of the said Temporary Receiver realized the sum of $19,475.35 gross and that after deduction of administration expenses, there was turned over to the Trustee the sum of $18,304.61.

Twelfth. That there have been filed with this Court against the above-named estate and allowed proofs of claim aggregating approximately $55,000.00, exclusive of $6,000.00 in claims now under objection.

Thirteenth. That in the said matter, there have been paid as counsel fees pursuant to order of this Court the sum of $500.00 to Krause & Hirsch, as counsel for the Irving Trust Company, as Receiver, the sum of $60.00 to Eugene V. King, for services as counsel for petitioning creditors, plus $32.00 [fol. 9] for disbursements, the sum of $65.00 to Bernard A. Grossman, as counsel for the bankrupt, and consideration of the application by Edward M. O. Pratt, for further compensation as counsel for the bankrupt in the sum of $500.00 has been deferred until the final meeting of creditors in this matter.

Fourteenth. That at the time of the said transfer of the sum of $2,500.00 to Conrad, Rubin & Lesser, the bankrupt herein had on hand only a nominal cash balance and by reason thereof in order to effect the said transfer sold a quantity of merchandise to one John I. Hart on November 3, 1930, and transferred to the said Conrad, Rubin & Lesser by delivery and endorsement the identical check received

in payment for the said merchandise from the said John I. Hart.

Fifteenth. That by reason of the foregoing, the transfer aforesaid was made directly or indirectly in contemplation of bankruptcy proceedings.

As and for a Second Count Against the said Respondents

Sixteenth. Your petitioner repeats, reiterates and realleges each and every allegation set forth herein with the same force and effect as though set forth herein at length.

Seventeenth. That this is a proceeding pursuant to § 67e of the National Bankruptcy Act of 1898, and the amendments thereto to recover a fraudulent transfer.

[fol. 10] Eighteenth. That the transfer aforesaid of $2,500.00 to the respondents Conrad, Rubin & Lesser was made with the intent to delay, hinder and defraud creditors and accepted by the said respondents with like intent and not in good faith nor for a present fair consideration.

Wherefore your petitioner respectfully prays for an order under §§ 60d and 67e of the Bankruptcy Act of 1898, and the amendments thereto, that the said transfer and payment be re-examined by this Court and that the reasonableness of the said transfer be re-examined and the respondents be directed to return to your petitioner for the benefit of the estate aforesaid the sum of $2,500.00, or such portion thereof as to the Court may seem reasonable, and for such other and further relief as may be proper in the premises.

Dated New York, May 29th, 1931.

Horace G. Pender, Petitioner.

Duly sworn to by Horace G. Pender. Jurat omitted in printing.

[fol. 11] In United States District Court

[Title omitted]

Notice of Motion to Dismiss

Sirs: Please take notice that upon the petition of Horace G. Pender, verified the 29th day of May, 1931, and the no-

tice of motion herein, dated May 26th, 1931, heretofore served upon us, a motion will be made before Hon. Oscar W. Ehrhorn, Referee in Bankruptcy, upon the return date of said petition and notice of motion as adjourned, viz., on [fol. 12] the 22nd day of June, 1931, at 2.30 o'clock in the afternoon, at the office of the said Referee, No. 280 Broadway, Borough of Manhattan, City of New York, for an order dismissing the said petition upon the ground that the same and each count thereof fails to state facts sufficient to constitute a claim within the jurisdiction of the said Referee and that the same is insufficient in law upon its face, or in the alternative, for an order striking out as irrelevant and improper, paragraphs "Seventh," "Eighth," "Ninth," "Tenth," "Eleventh," "Twelfth," "Thirteenth," "Fourteenth" and "Fifteenth" of said petition, and for such other and further relief as to the said Referee may seem just and proper.

Dated New York, June 13th, 1931.

Yours, etc., Conrad, Rubin & Lesser, Respondents.
Office & P. O. address: 150 Broadway, Borough of Manhattan, City of New York.

To Krause & Hirsch, Esqs., attorneys for trustee, 225 Broadway, New York City.

[fol. 13] In United States District Court

[Title omitted]

Affidavit of William W. Conrad in Support of Motion by Respondents

State of New York,
County of New York, ss:

William W. Conrad, being duly sworn, deposes and says:

I am a member of the firm of Conrad, Rubin & Lesser, respondents in the proceedings which have been commenced before Hon. Oscar W. Ehrhorn, Referee in Bankruptcy, to re-examine payment of $2,500.00 made by David Bell Scarves, Inc., to the said firm for services rendered prior to the filing of the petition in bankruptcy herein.

Upon the return date of the petition as adjourned, an application was made to dismiss the petition on the ground that the same fails to state facts sufficient to constitute a claim within the jurisdiction of the Referee and upon such application the attorneys for the Trustee consented to withdraw the Second Count of the petition. Upon discussion before the Referee as to the sufficiency of the First Count, the determination of said matter was reserved pending the filing of an affidavit showing the nature of the services ren- [fol. 14] dered by deponent's firm and of the circumstances surrounding the said transaction.

This affidavit is filed solely for the purpose of indicating affirmatively the nature of the said transaction and of the services rendered, for the purpose of establishing that such services and arrangements made therefor were not such as come within the purview of the Referee, under Section 60d of the Bankruptcy Act, and this affidavit is so filed without prejudice to the claim made by the respondents that the petition on its face fails to state facts sufficient to show the jurisdiction of the Referee with respect thereto.

Deponent was consulted by David Bell Scarves, Inc., through David Bell, one of its officers, on October 31, 1930. At that time he gave him a statement of the financial condition of the company as of September 30th, a copy of which is hereto annexed and marked Exhibit A.

As appears from said statement, while the capital of the corporation had been seriously impaired by operating losses during the preceding six months period, the corporation was entirely solvent. Its difficulty consisted in the fact that some of its liquid assets had been pledged and that other portions of its assets consisted of non-liquid merchandise, machinery and fixtures. It is obvious from the said statement that the only remedy for the business would have been to disclose its condition frankly to creditors and request an extension of time and the operation of the business under the supervision of the creditors, to the end that its assets might be liquidated without undue pressure and the business permitted to continue under such [fol. 15] restrictions as to conserve the rights of its creditors. Deponent respectfully points out that the forced liquidation of this estate in bankruptcy actually realized a very substantial amount.

Deponent has in the past had considerable experience in working out arrangements which have resulted in both protecting the rights of the creditors and at the same time saving a business from collapse and deponent has had occasion at numerous times to co-operate with the New York Credit Men's Adjustment Bureau, Inc., which is organized to protect the rights of creditors in such cases and is well acquainted with that organization and its officials.

Your deponent, when consulted by Mr. Bell, agreed to take charge of the negotiations to bring about such arrangement with creditors as would both serve the interests of the creditors and at the same time save the business of the corporation, and agreed to render such services for a fee of $2,500.00. Deponent does not at this time present to the Court a statement of the services actually rendered, in view of deponent's position that the same are not within the purview of the Bankruptcy Act and particularly Section 60d. The fact is that such services were entirely inconsistent with the purposes and scope of the Bankruptcy Act and were not in any sense within their purview. They were aimed toward the very reverse, i. e., the rehabilitation of the business of the corporation and not the destruction thereof by bankruptcy. Deponent goes further and states that the filing of a petition in bankruptcy herein by the petitioning creditors was not only bad judgment but almost a business crime. The result of the filing of a pe-[fol. 16] tition in bankruptcy compelled the liquidation of a going concern under circumstances which could necessarily realize only a small fraction of the value of the business as a going concern and the creditors have been to that extent prejudiced.

The services to be rendered by your deponent consisted in doing things which would of themselves negative the possibility of a liquidation in bankruptcy. The most extreme course which was within the contemplation of your deponent and of Mr. Bell was the continuance of the business under the supervision of an Equity Receiver, even though that course was not contemplated if the business could be continued under the supervision of a committee of creditors or a representative of the New York Credit Men's Adjustment Bureau, Inc. Your deponent has in the past at numerous times arranged with that organization for a supervisory arrangement, under which payments to credi-

tors have been assured without the expense of an equity receivership.

Your deponent in the present case had no connection whatsoever with the filing of the petition in bankruptcy nor was the same filed directly or indirectly with his knowledge, approval or acquiescence. On the contrary, the petition herein was filed by certain creditors for reasons which we are unable to understand and was neither contemplated by deponent or the said David Bell Scarves, Inc., or its officers, nor was the same in any manner under consideration at the time deponent's services were engaged and rendered. The filing of a petition in bankruptcy terminated any further usefulness which might result from the efforts made by deponent.

[fol. 17] This affidavit is filed with the express reservation of the right to a hearing as to the services rendered and a reasonable compensation to which deponent's firm is entitled by reason thereof, in the event that it should ultimately be determined that the payment therefor comes within the purview of Section 60d of the Bankruptcy Act.

William W. Conrad.

Sworn to before me this 30th day of June, 1931. Leopold O. Rothschild, Commissioner of Deeds, N. Y. City, residing in the County of New York. N. Y. Co. Cl'k's No. 101, Reg. No. 40R3. Kings Co. Cl'k's No. 38, Reg. No. 3033. Bronx County Cl'k's No. 10, Reg. No. 33R9. Queens Co. Cl'k's No. 554, Reg. No. 216. Commission expires April 21, 1933.

[fol. 18] EXHIBIT "A" TO AFFIDAVIT OF WILLIAM W. CONRAD

David Bell Scarves, Inc.

Balance-sheet as at September 30, 1930

Assets

Current Assets:			
Cash in Bank			$5,907.67
Cash on Hand			121.55
Accounts Receivable—Good		$6,617.17	
Accounts Receivable—Doubtful		2,788.81	
Accounts Receivable—Assigned	$30,230.50		
Less: Amount Received Thereon	18,138.30		
Equity in Assigned Accounts		12,092.20	
		$21,498.18	
Less: Reserve for Cash Discount		1,730.81	19,767.37
Deposits Receivable			55.00
Due from Creditors (Debit Balances)			63.04
Merchandise Inventory:			
On Hand		$23,978.83	
Salesmen's Samples		400.00	24,378.83
Fixed Assets:			
Machinery & Fixtures		$18,043.48	
Less: Reserve for Depreciation		2,560.60	15,482.88
Deferred Charge:			
Unexpired Insurance			51.56
			$65,827.90

Liabilities

Current Liabilities:			
Accounts Payable	$47,635.73		
Less: Anticipated Discount	2,528.15	$45,107.58	
Notes Payable—Trade		680.67	
Notes Payable—Bank		4,000.00	
Due to Customers (Credit Balances)		425.22	
Payroll and Expense Accrued		2,972.72	$53,186.19
Capital:			
Capital Stock Issued and Outstanding		$35,000.00	
Surplus—April 1, 1930		2,329.30	
		$37,329.30	
Deduct: Net Loss, April 1, 1930, to September 30, 1930		24,687.59	
Capital, September 30, 1930			12,641.71
			$65,827.90

[fol. 19] IN UNITED STATES DISTRICT COURT

[Title omitted]

MEMORANDUM OF REFEREE ON OBJECTION TO JURISDICTION OF REFEREE MADE BY RESPONDENTS TO TRUSTEE'S MOTION TO REVIEW ATTORNEYS' FEE, PURSUANT TO SECTION 60-D OF BANKRUPTCY ACT

The undersigned Referee, after a careful consideration of the allegations, is of the opinion that the objection to the jurisdiction of the Referee is not well taken and should be overruled.

A further date may be obtained from the Referee's office for the purpose of taking testimony.

Dated New York, July 17, 1931.

Oscar W. Ehrhorn, Referee in Bankruptcy.

[fol. 20] IN UNITED STATES DISTRICT COURT

[Title omitted]

PROPOSED ORDER SUBMITTED BY RESPONDENTS

A petition having been filed herein by the Trustee to re-examine the payment of $2,500.00 made by David Bell Scarves, Inc., to Conrad, Rubin & Lesser, attorneys, and said petition having duly come on for hearing on the 8th day of June, 1931, and the said Conrad, Rubin & Lesser, respondents, having appeared herein and objected to the jurisdiction of the Referee and having upon due notice moved for a dismissal of the petition upon the ground that the said petition and each count thereof fail to state facts sufficient to constitute a claim within the jurisdiction of the Referee, and the said proceedings having duly come on for hearing,

Now, upon reading and filing the notice of application herein dated May 26th, 1931, and the petition of Horace G. Pender, verified May 29th, 1931, in support of said application and the cross notice of motion for a dismissal thereof, dated June 13th, 1931, and the affidavit of William W. Conrad, verified June 30th, 1931, in support of said cross-motion, and after hearing George C. Levin, Esq., in support of said application, and Samuel Rubin, Esq., in

[fol. 21] support of said cross-motion, and the petitioner having withdrawn the second count of said petition, and due deliberation having been had, it is

Ordered that the said objection to the jurisdiction of the Referee be and the same hereby is overruled; and it is further

Ordered that the motion made by the respondents to dismiss the first count of the said petition on the ground that the same does not state facts sufficient to constitute a claim within the jurisdiction of the Referee be and the same hereby is denied.

Dated New York, July —, 1931.

—— ——, Referee in Bankruptcy.

In United States District Court

In re David Bell Scarves, Inc.

Motion re Fee of Attorney for Bankrupt

Before Hon. Oscar W. Ehrhorn, Referee

Stenographer's Minutes—June 15, 1931

New York, June 15, 1931—at 2.30 p. m.

Appearances

Messrs. Krause & Hirsch, attorneys for Trustee, by Mr. Marcus.

(Adjourned by consent to Monday, June 22, 1931, at 2.30 p. m.)

[fol. 22] In United States District Court

In re David Bell Scarves, Inc.

Before Hon. Oscar W. Ehrhorn, Referee

Adjourned Hearing on Motion re Fees of Attorneys for Bankrupt

Stenographer's Minutes—June 22, 1931

New York, June 22, 1931—at 2.30 p. m.

Present: Messrs. Krause & Hirsch, for the trustee, by George C. Levin, Esq.; Messrs. Conrad, Rubin & Lesser, respondents, by Samuel Rubin, Esq.

Mr. Levin: I file notice of motion and stipulation of adjournment attached thereto, in behalf of the Trustee.

Mr. Rubin: We serve, your Honor, and file a cross-motion attacking the sufficiency of the papers, and also move to strike out a portion of them in the alternative.

Mr. Levin: With respect to that motion made by the respondents, I call your Honor's attention to the fact that the Trustee withdraws the second count set forth in the moving papers of the Trustee.

The Referee: All right, withdraws the second.

Mr. Levin: That is right, in view of the jurisdictional objection, since the relief prayed for in the second count can be granted by this Court only upon consent of the respondents.

[fol. 23] (Argument off the record.)

The Referee: Affidavit or petition for allowance, in whatever form is desired by the attorneys, to be filed and served within one week, and the hearing is adjourned to July 2, at 2.30.

(At 2.15 p. m. adjourned to Thursday, July 2, 1931, at 2.30 p. m.)

In United States District Court

In re David Bell Scarves, Inc.

Before Hon. Oscar W. Ehrhorn, Referee

Reargument re Fees of Attorneys for Bankrupt

Stenographer's Minutes—July 23, 1931

New York, July 23, 1931—at 12 m.

Appearances

Messrs. Krause & Hirsch, for the trustee, by George C. Levin, Esq.

Messrs. Conrad, Rubin & Lesser, respondents, by Samuel Rubin, Esq.

(After argument off the record.)

The Referee: I will take whatever testimony you have, Mr. Levin, with regard to services rendered.

Mr. Rubin: We appear here specially for the purpose of [fol. 24] objecting to the jurisdiction of the Court, in accordance with the notice of motion to dismiss the proceeding heretofore filed; and we submit a form of order for the signature of the Referee, denying the motion in accordance with the memorandum heretofore filed by the Referee.

Mr. Levin: I ask your Honor to refuse to sign this order, on the ground that the decision which your Honor has just made, holding that there is jurisdiction of the Court, constitutes a mere interlocutory decision in this proceeding, and is not a final determination; and that, in line with the authorities, among which I cite to your Honor the decision, in this Circuit, in re Childs v. Ultramares Corporation, 40 Fed. 2nd 474. I ask your Honor to direct the respondents, pursuant to their own request set forth in their affidavit filed in this proceeding, sworn to June 30, 1931, by William W. Conrad, to appear and give such proof as they desire with respect to the services they have rendered, in order that your Honor can determine the reasonableness of the fee paid to them.

Mr. Rubin: We take the position, your Honor, that in connection with the order which we have submitted and the order which has heretofore been signed, that the motion which has been made by us for an order dismissing this proceeding on the grounds set forth in the notice of motion, we are entitled, as a matter of law, to have determined that motion. Whether or not the order is an interlocutory order, and whether or not the same is subject to review, is a matter which is not within the province of the Referee to determine. That question can only be determined by [fol. 25] the Court.

Mr. Levin: I recognize that the respondents do not consent to the jurisdiction of this Court, but appear involuntarily, solely by direction of the Court.

The Referee: Yes. The Referee will take such testimony as may be offered with reference to the services rendered and will then make what in his judgment is a proper order,

which will properly protect the respondents in their position of lack of jurisdiction; and he holds that the matter should be submitted as one whole on the question of the value of the services and the jurisdiction, and a determination on a petition to review to the District Judge.

Mr. Rubin: I respectfully except.

Mr. Levin: Now, in connection with this proceeding, I ask you, Mr. Rubin, whether you desire the Trustee to give proof as to the allegations set forth in the first count of the petition?

Mr. Rubin: We take no position whatsoever as to any proof that the Trustee desires or wishes to give.

Mr. Levin: Well, I ask you whether you insist on formal proof being given with respect to the allegations——

Mr. Rubin (interrupting): If your Honor please, I can only answer that we cannot either concede or refuse to concede any of these allegations. We have already filed an affidavit setting forth the facts, and in that affidavit certain statements are made as to formal allegations which may be considered as proof.

(After discussion off the record.)

Mr. Rubin: For the purpose of the record, I am not questioning any of the formal allegations, as to the filing of the petition, as to the proceedings taken in connection with the [fol. 26] receivership; but all of these concessions are made without prejudice to our position, that we do not take part in this proceeding, on the merits.

Mr. Levin: I understand that perfectly, that any concessions you make here are to be without prejudice to your rights in the proceeding, and I merely ask you whether you will require specific proof, for instance, on allegations Seventh, Eighth, Ninth and Fourteenth of the petition.

Mr. Rubin: Mr. Levin, I cannot, consistently with my position, either require or waive any particular proof.

Mr. Levin: All right; I will offer formal proof then.

Offers in Evidence

From the files of this Court, I offer in evidence, and I ask that the same be deemed marked, since it constitutes

an original record, proof of claim of Edward M. O. Pratt, in the amount of $6,262.55, for legal services as set forth in a detailed memorandum annexed to the proof of claim. I ask that the claim be deemed marked Exhibit 1.

The Referee: Yes.

(Same deemed marked as Trustee's Exhibit 1, July 23, 1931.)

Mr. Levin: Reading from the exhibit just offered, may the record indicate that the enumeration of services, attached to the proof of claim, includes, among other items, the following: "David Bell Scarves, Inc., with creditors, conference with client, conference with M. J. Davis, Mr. Oppenheim, Mr. Miller, of New York Credit Men's Adjustment Bureau, arranging for examination of books of David Bell Scarves, Inc., calling meeting of creditors, attending [fol. 27] meeting of creditors, attendance at meeting of creditors, drawing corporate minutes, resignations, etc., conferring with Credit Men's Association, re deed of trust, drawing of deed of trust, attendance at Committee's meeting, re submission of new offer of settlement, etc., as agreed, $2,000, received on account $750, balance, $1250."

I offer in evidence check of the bankrupt to the order of Edward M. O. Pratt, dated October 23, 1930, in the amount of $750.

(Check marked Trustee's Exhibit 2, July 23, 1931.)

Mr. Levin: I offer in evidence, as one exhibit, four checks of the bankrupt, to the order of David Bell, of the following dates and amounts: October 21, 1930, $500; October 28, 1930, $600; November 1, 1930, $150; November 5, 1930, $250.

(Four checks marked Trustee's Exhibit 3, July 23, 1931, as one exhibit.)

Mr. Levin: I offer in evidence as one exhibit, three checks of the bankrupt to the order of Israel Bell, of the following dates and amounts: October 23, 1930, $500; October 28, 1930, $100; November 1, 1930, $150.

(Three checks marked Trustee's Exhibit 4, July 23, 1931, as one exhibit.)

Mr. Levin: I assume that with respect to paragraphs second, third and fourth of the petition, the Court will take judicial notice of the filing of the petition and adjudication and appointment of the Trustee.

The Referee: Yes.

[fol. 28] Mr. Levin: I offer in evidence, and ask that the original testimony taken in this proceeding, of David Bell, an officer of the bankrupt, before this Court on January 22 and 26, 1931, be deemed marked.

The Referee: No; not as against these respondents, because they have had no opportunity to cross-examine. It can be used as against the bankrupt, but not as against third parties: and even though no objection is made by the respondents, due to the position they take, I will deny the motion.

Mr. Levin: I would like to have the record indicate that Mr. Rubin is still in the courtroom during all this proceeding.

Mr. Rubin: He is here, but purely as a spectator. May the record state, that even though I am here and refraining from making objections, I do so, of course, without prejudice to my position.

The Referee: I appreciate that. I have so stated.

Mr. Levin: In view of your Honor's ruling, I will ask that the testimony in question be deemed marked for identification.

The Referee: Yes; it may be deemed marked for identification.

(Testimony of David Bell deemed marked Trustee's Exhibit 5 for Identification, July 23, 1931.)

Mr. Levin: I offer in evidence a filed paper in these bankruptcy proceedings, and ask that it be deemed marked as an exhibit, the dividend sheet of this Court, declaring a first dividend on March 12, 1931.

[fol. 29] (Dividend sheet deemed marked Trustee's Exhibit 6, July 23, 1931.)

Mr. Levin: And may it specifically appear, that reading from the exhibit just offered, that David Bell has filed a priority claim in the sum of $300, and a general claim in the sum of $2,355.26; and that Israel Bell has filed a priority claim in the sum of $300, and a general claim of $860.

I offer in evidence, and ask that it be deemed marked as an exhibit, as an admission against interest, the original affidavit on file in this proceeding, sworn to by William W. Conrad on June 30, 1931.

(Affidavit deemed marked Trustee's Exhibit 7, July 23, 1931.)

Mr. Levin: I offer in evidence, from the files of this Court, and ask that it be deemed and marked as an exhibit, the testimony of one of the respondents William W. Conrad, taken before this Court on May 18, 1931.

The Referee: Yes.

(Testimony of William W. Conrad deemed marked Trustee's Exhibit 8, July 23, 1931.)

Mr. Levin: And I ask that this photostatic copy of a check, which was marked as an exhibit on that examination, dated November 3, 1930, be marked as an exhibit in this proceeding.

The Referee: All right; mark it.

(Same marked Trustee's Exhibit 9, July 23, 1931.)

[fol. 30] Mr. Levin: I ask that the order of this Court appointing the Irving Trust Company as Receiver, and the proceedings and papers on file in this court relating to the discharge of the Receiver, and payments made for administration expenses in connection with that proceeding, be deemed marked as an exhibit in this case.

(Same deemed marked Trustee's Exhibit 10, July 23, 1931.)

Mr. Levin: The Trustee rests. Have you anything further to say, Mr. Rubin?

Mr. Rubin: I merely suggest this: That I understand that all of this testimony was offered over my objection and exception.

Mr. Levin: That is not so. Counsel sat here and made no objection to the various offers of proof that I made before this Court.

Mr. Rubin: I am not talking about objections to the method of proof, but over my objections to the jurisdiction of the Referee to take any testimony.

Mr. Levin: Oh, I quite agree to that.

Mr. Rubin: None of this testimony was taken with a view to determining the question of jurisdiction, because, as I understand your Honor's order, your Honor has already determined the question of jurisdiction from the affidavits. Will your Honor receive this order at this time and take it up in the regular course (submitting document)?

The Referee: Yes.

(At 12:45 p. m. closed.)

[fol. 31] TRUSTEE'S EXHIBIT 1—July 23, 1931

The claim of Edward M. O. Pratt, Esquire, filed against the estate in bankruptcy of David Bell Scarves, Inc., in the office of the referee herein, in the amount of $6,262.55. A detailed statement of the items comprising this claim appears at pages 26 and 27 of this record.

TRUSTEE'S EXHIBIT 2—July 23, 1931

David Bell Scarves, Inc., 105-107 5th Avenue

New York, Oct. 23, 1930. No. 2761.

The Chase National Bank of the City of New York, Garfield Branch, Fifth Avenue at 23rd Street, pay to the order of Edward M. O. Pratt $750.00/100, seven hundred fifty 00/100 Dollars.

David Bell Scarves, Inc. David Bell, President.

(Certification stamped across face:) Accepted. Payable only through the N. Y. Clearing House when properly endorsed. Oct. 25, 1930. The Chase National Bank of the City of New York, Garfield Branch. W. H. A.

[fol. 32] (Stamped on back:) Received payment through New York Clearing-house. Prior endorsement guaranteed. Oct. 27, 1930. The Bank of America National Association, Times Square Office, New York, N. Y. Henry J. Schuler, Vice-Pres. & Cashier.

TRUSTEE'S EXHIBIT 3—July 23, 1931

(Four Checks)

New York Oct. 21, 1930. No. 517.

Pay to the Order of David Bell $500.00/xx, five hundred and no/xx Dollars.

David Bell Scarves, Inc. David Bell, Pres.

Sterling National Bank & Trust Company of New York, 42nd Street at Lexington Avenue.

(Stamped across face:) Certified. Payable only as originally drawn and when properly endorsed. $500 and 00 cts. Sterling National Bank & Trust Company of New York. Oct. 23, 1930. No. 006,912. (Name illegible) Teller. Do not destroy.

[fol. 33] (Endorsed on back:) O.K. David Bell. David Bell.

New York, Oct. 28, 1930. No. 566.

Pay to the order of David Bell $600.00/xx, six hundred and no/xx Dollars.

David Bell Scarves, Inc. David Bell, Pres.

Sterling National Bank & Trust Company of New York, 42nd Street at Lexington Avenue.

(Endorsed on back:) O.K. David Bell.

New York, Nov. 1st, 1930. No. 592.

Sterling National Bank & Trust Company of New York, 42nd Street at Lexington Avenue, pay to the order of David Bell $150.00/xx, one hundred fifty 00/100 Dollars.

David Bell Scarves, Inc. David Bell, Pres.

[fol. 34] (Endorsed on back:) O.K. David Bell, Hotel Statler, Boston. Exchange Check Account. Pay to the Order of Any Bank, Banker or Trust Co. Prior Endorsements Guaranteed. Nov. 5, 1930. The Second National Bank, 5-17, Boston, Mass., 5-17. Herbert E. Stone, Cashier.

New York, Nov. 5, 1930. No. —.

Sterling National Bank & Trust Company of New York, 42nd Street at Lexington Avenue, pay to the order of David Bell $250.00/xx, two hundred fifty and no/xx Dollars.

David Bell Scarves, Inc. David Bell, Pres.

(Endorsed on back:) O.K. David Bell. P. Phillips.

[fol. 35] TRUSTEE'S EXHIBIT 4—July 23, 1931

(Three Checks)

New York, October 23, 1930. No. 519.

Pay to the order of Israel Bell $500.00/100, five hundred 00/100 Dollars.

David Bell Scarves, Inc. David Bell, Pres.

Sterling National Bank & Trust Company of New York, 42nd Street at Lexington Avenue.

(Stamped across face:) Certified. Payable only as originally drawn and when properly endorsed. $500 and 00 cts. Sterling National Bank & Trust Company of New York. Oct. 30, 1930. No. 006,997. (Name illegible) Teller. Do not destroy.

(Endorsed on back:) Israel Bell. O.K. David Bell.

[fol. 36] New York, Oct. 28, 1930. No. 565.

Pay to the order of Israel Bell $100.00/100, one hundred 00/100 Dollars.

David Bell Scarves, Inc. David Bell, Pres.

Sterling National Bank & Trust Company of New York, 42nd Street at Lexington Avenue.

(Stamped across face:) Certified. Payable only as originally drawn and when properly endorsed. $100 and 00 cts. Sterling National Bank & Trust Company of New York. Nov. 1, 1930. No. 007,001. (Name illegible) Teller. Do not destroy.

(Endorsed on back:) O.K. David Bell. Israel Bell. For deposit (illegible). Received Payment Through Federal Reserve Bank of New York. Prior Endorsements Guaranteed. Nov. 1, 1930. Irving Trust Company, New York, Woolworth Office.

[fol. 37] New York, November 1st, 1930. No. 593.

Sterling National Bank & Trust Company of New York, 42nd Street at Lexington Avenue, pay to the order of Israel Bell $150.00/100, one hundred fifty 00/100 Dollars.

David Bell Scarves, Inc. David Bell, Pres.

(Endorsed on back:) Israel Bell, Bell Drug Co. Peter Bell, Ph.G. Received Payment Through the Federal Clearing Section of the Federal Reserve Bank of N. Y. Prior Endorsements Guaranteed. Nov. 5, 1930. Fidelity Trust Company of New York. The Marine Midland Trust Company of New York, N. Y.

TRUSTEE'S EXHIBIT 5—July 23, 1931

(Marked for Identification)

The testimony of David Bell, taken at an adjourned first meeting before Hon. Oscar W. Ehrhorn, Referee in Bankruptcy, on January 22, 1931, insofar as material, is as follows:

The bankrupt called a meeting of its creditors on October 29th, 1931, to determine what action should be taken in connection with its affairs.

[fol. 38] David Bell, president of the bankrupt corporation, made the following withdrawals by check for back salary that he could not draw previously because of insufficient funds:

Date	Amount
Oct. 21, 1930	$500.00 (certified)
Oct. 28, 1930	600.00
Nov. 1, 1930	150.00
Nov. 5, 1930	250.00
	$1,500.00

Israel Bell, a brother of David Bell, and employee of the bankrupt corporation, received the following payments for back salary:

Date	Amount
Oct. 23, 1930	$500.00 (certified)
Oct. 28, 1930	100.00 (certified)
Nov. 1, 1930	150.00
	$750.00

Edward M. O. Pratt, who acted as one of the attorneys for the bankrupt in its negotiations with its creditors, and with whom David Bell had agreed upon a fee of $2,000, received a payment on account of $750.00 by certified check, dated October 23, 1930.

[fol. 39] TRUSTEE'S EXHIBIT 6—July 23, 1931

The first dividend sheet, dated March 12, 1931. The referee's order provides for a dividend of 16⅔ percent.

Total amount of claims on file with the Referee	$50,174.45
Actual sum paid pursuant to dividend	8,350.96
Claims which are on file with the Referee, payment of which has been withheld due to objections filed by the Trustee	22,158.03
Total claims filed	72,332.48

TRUSTEE'S EXHIBIT 7—July 23, 1931

Affidavit sworn to by William W. Conrad, on June 30, 1931, which is set forth in full at pages 13 to 17 of this record.

TRUSTEE'S EXHIBIT 8—July 23, 1931

In re DAVID BELL SCARVES, INC.

Before Hon. Oscar W. Ehrhorn, Referee

Adjourned First Meeting

New York, May 18, 1931—at 3 p. m

Present: Messrs. Krause & Hirsch, for the Trustee, by George C. Levin, Esq.

[fol. 40] WILLIAM W. CONRAD (residing at No. 230 Central Park West, N. Y. City), being first duly sworn by the Referee, testified as follows:

Examination by Mr. Levin:

Q. What is your full name?
A. William W. Conrad.
Q. You are an attorney-at-law admitted to practice in this State?
A. I am.
Q. Do you practice individually, or under a firm name?
A. Firm name.
Q. Will you give the name and address?
A. Conrad, Rubin & Lesser, 150 Broadway.
Q. Do you know the corporation known as David Bell Scarves, Inc.?
A. I do.
Q. Did you ever do any legal work for that concern?
A. I did.
Q. Commencing when?
A. I don't know the exact date on that—when was the petition filed, do you know?
Q. November 17.
A. November 17? On or about the 5th of November, 1930—between the 5th and the 17th.
Q. Was that the first time you had ever been retained by that corporation?
A. I don't remember. In this matter, it was.
Q. Who of that company retained you?
A. David Bell.
Q. I assume you mean that your firm was retained?
A. How is that?
Q. (Question repeated.)
A. That is right.
Q. Prior to this retention, on or about November 5, did you ever do any legal work for David Bell Scarves, Inc.?
A. I don't remember.
Q. Have you no idea whatever?
A. Well, I may have done business under the other firm, Conrad & Pratt—I know I represented David Bell.
[fol. 41] Q. About how long previously would you say that took place?

A. Oh, for years. I don't know whether that corporation was formed after I split with Pratt——

Q. In connection with this retention in November, what did Mr. Bell come and ask you to do?

A. Well, I had a conference with him and he told me that he had had a meeting with some creditors—some of his creditors, and that he was contemplating a settlement, and retained me to conduct negotiations for such settlement, and also to arrange some money in order to assist him with that settlement.

Q. Do you know a Mr. Belsky?

A. I do.

Q. What is his first name? Jacob, is it?

A. Jacob, yes, that is right.

Q. What is his relationship to David Bell, if you know?

A. He is his brother.

Q. Do you do legal work for Jacob Belsky?

A. I do.

Q. You know him very well?

A. Yes.

Q. Was it through Mr. Jacob Belsky that David Bell came to you?

A. I think so.

Q. Now, on the occasion of that conference with Mr. Bell, did he tell you how badly involved his company was?

A. Well, he gave me the figures, which I studied over in the next couple of days, and——

Q. (Interrupting.) Have you those figures with you?

A. I have not.

Q. You have been subpœnaed to produce all your records in connection with your services in this matter.

A. Is that a question?

Q. Well, I want to know where those records are.

A. I have no record.

Q. You have no records whatsoever?

A. No.

[fol. 42] Q. Did you have a file on this matter?

A. I may have, but there are no records.

Q. Well, have you produced your docket entries in connection with this case?

A. No.

Q. Did you have any such?

A. No.

Q. Do you have any legal documents in connection with this matter?

A. No.

Q. Do you have any correspondence in connection with this matter?

A. I don't think so.

Q. In other words, the only thing that took place in connection with this matter——

A. (Interrupting.) Were conferences.

Q. Were conferences?

A. That is right.

Q. Now, have you any records to indicate the number of conferences that you had?

A. I have a fair recollection.

Q. My question was, have you any records to indicate the number of conferences that you had?

A. No.

Q. Well, how many conferences would you say you had on this matter?

A. 10 or 12.

Q. Now, will you please give us the dates of the various conferences and the places where they were held?

A. Well, the first conference I had was on the second Friday preceding the petition in bankruptcy. The conference was held at Mr. Belsky's office, at 205 West 39th Street, where he conducts business under the Quality Dresses, Inc. I had a further conference with Mr. Bell at my home at 230 Central Park West, on the Sunday following. I had several conferences during the next two or three days at Mr. Edward M. O. Pratt's office at 1440 Broadway, and conferred with a Mr. Davis, who was connected with David Bell Scar-es; Mr. Bell, a third brother of Mr. Bell's—I think I. Bell—at my office; and then had a con-
[fol. 43] ference on the Tuesday following my first conference, at my home, about 8 o'clock in the evening, which lasted until about 12. And then the following day, which was Wednesday, a meeting of creditors, or a meeting of the committee representing the creditors, was held at the office of David Bell Scarves, Inc., several hours. I then had a meeting at the National Credit Men's Association at 468 Fourth Avenue, a day or two thereafter; and then a further meeting the following Saturday.

Q. Any other conferences?

A. There were some others at my office, and also at the office of Mr. Belsky.

Q. How many times were you at the office of the Credit Men's Association?

A. Twice.

Q. At the occasion of those conferences who on behalf of the Credit Association handled the matter?

A. S. B. Miller and Mortimer Davis.

Q. How long did those conferences last?

A. The first conference lasted two or three hours. The next conference, about an hour and a half.

Q. Did you execute a written retainer in connection with this matter?

A. I did not.

Q. Did you give any receipt for your compensation?

A. I did not.

Q. When was the matter of compensation arranged?

A. At the first meeting I had in this matter.

Q. And what was the conversation in that connection?

A. Mr. Belsky asked how much I would charge; and I told him my usual fee in these matters is $5,000; that I was not interested and would not like to be interested in any proceeding between a debtor and his creditors for a lesser amount. He thereupon asked me if I could do something better.

[fol. 44] Q. Who made this request?

A. Mr. David Bell. And he wanted to know whether I could arrange a settlement with the creditors. I told him, "I think that a settlement possibly could be arranged and——"

Q. (Interrupting.) Did he at that time tell you what his liabilities were?

A. He did.

Q. And what was the amount stated?

A. As I remember, the liabilities, around $70,000.

Q. From whom did you get your information?

A. From Mr. David Bell.

Q. Did he supply you with any written figures?

A. He showed me a financial statement.

Q. Was anything said as to the assets available to creditors at that time to meet those liabilities?

A. The assets, at cost or market, were about the same figure.

Q. In other words, the corporation was solvent?

A. Yes.

Q. And what were your services required for?

A. Well, he was unable to meet his maturing obligations, and he wanted to effect some cash settlement with the creditors; the assets consisting of stock and machinery, not then available for payment to its creditors.

Q. Was there any talk as to the proposed figure that the creditors would realize on any settlement?

A. The proposed figure of 50 per cent. He told me if they could arrange a 50 per cent settlement, it would be satisfactory to them, they to arrange to obtain a part of this money and a part to be secured by hypothecating accounts receivable.

Q. Who is the "they" to whom you refer?

A. Well, Davis Bell and Jacob Bell.

Q. Jacob Belsky?

A. Jacob Belsky.

Q. And exactly what were your services to consist of?

[fol. 45] A. Arranging to hypothecate the accounts receivable for them, and to arrange a settlement with the creditors of the corporation.

Q. Did you know at that time that a Mr. Pratt was acting on behalf of the company?

A. I did.

Q. What was told to you in that connection?

A. That Mr. David Bell had consulted Mr. Pratt regarding this matter. However, they were not satisfied with his services; so I suggested, in view of the situation, in order not to cause any friction, that he be allowed to remain the attorney of record, and that I would work in conjunction with Mr. Pratt.

Q. You, I take it, regarded yourself as a specialist in this type of matter?

A. Not particularly, except I have had quite a bit of experience in these matters.

Q. Well, was there anything of a specially difficult nature in this matter that required additional legal services?

A. Yes; there were certain elements in this case that possibly needed a man that was trained in these kind of matters; the question of negotiating properly.

Q. What were the special elements?

A. Negotiations with creditors; having experience in such negotiations.

Q. I understood you to say that you did not claim yourself to be a specialist in this type of matter?

A. I do not, excepting I think I have had more than the ordinary experience in these matters, of the ordinary attorney.

Q. This resolved, did it not, into merely a matter of sitting down with the creditors and getting the best settlement figure possible?

A. That is correct.

Q. There were no special legal difficulties involved, were [fol. 46] there?

A. There may have been; I do not recall for the moment.

Q. Well, do you recall any now?

A. Well, it was a question of financial statements; and other questions, which I do not recall at the moment.

Q. You have no office records to refresh your recollection, I take it?

A. I have not.

Q. Well, what was the difficulty in connection with the financial statement?

A. Well, the usual trouble that you find in these kind of cases, where creditors claim statements to be false, and, of course, getting around it in a manner that you placate those creditors, in order that they may be in a position to accept, or even consider a settlement.

Q. Aside from the generalization, was there anything particular in the statement to which you refer?

A. I don't recall.

Q. Was there any talk as to how this $2,500 was to be paid, and when?

A. Cash; to be paid in cash. They told me they would have a check at my office, either the next day or the following Monday; and they did.

Q. I assume that you refused to act until you got that payment?

A. That is right.

Q. Did David Bell tell you that the company did not have the money to pay?

A. He did not.

Q. Did David Bell tell you that they would have to raise money in some way?

A. For what purpose?
Q. To pay you?
A. No.
Q. Well, how was this sum ultimately paid?
A. In cash; the entire fee to be paid in cash.
Q. Well, how was it paid?
A. By check.
Q. By check of the company?
A. No.
Q. Whose check was it?
A. I don't recall.
[fol. 47] Q. Didn't you make any inquiry when the check came in?
A. I was not interested. The corporation endorsed it and turned it over to my office and received a receipt for the check.
Q. Well, here you were dealing with an insolvent company. Weren't you interested in finding out whether the check you were receiving was a good one?
A. They were not insolvent.
Q. How much cash did they have on hand at the time?
A. I don't recall.
Q. You know as a matter of fact, do you not, that they did not have enough cash to pay your fee?
A. They told me they didn't have that day, but they would have the next day.
Q. Did they say how they were going to get it?
A. No.
Q. Who received the check for your firm?
A. I don't remember; someone in the office.
Q. Did you?
A. No.
Q. Who endorsed it?
A. I don't remember. I think some girl in the office.
Q. Isn't it a fact that you told them to go out and assign accounts receivable in order to obtain the cash to pay this fee?
A. No.
Q. Wasn't that part of your plan, to raise money by hypothecating accounts receivable?
A. If the settlement was accepted, they were to hypothecate accounts receivable and raise cash to effect such settlement.

Q. As a matter of fact, didn't Bell tell you that he had been assigning accounts receivable of the company?

A. I understood he had.

Q. So he did not need your advice or assistance in that connection, did he?

A. He did.

Q. For what?

A. To assign these accounts receivable.

[fol. 48] Q. Well, wasn't that merely a matter of negotiating with finance companies?

A. Part of it.

Q. There is nothing legal about that service, is there?

A. Oh, yes, there is.

Q. In what connection?

A. Well, the question of assigning them properly, that the assignor and the assignee are both protected in the proper manner.

Q. Well, the assignee generally looks after its protection pretty well, doesn't it?

A. Well, they have attorneys.

Q. I show you this photostatic copy of a check, and I ask you if that is the check given to you in payment for your legal services (handing)?

A. It is.

Mr. Levin: I offer this check in evidence.

(Marked Trustee's Exhibit 1, May 18, 1931.)

Q. Now, what is the last date upon which you performed services in this matter?

A. Around November 15 or 16.

Q. Well, would it help you in fixing that date if I tell you that the petition was filed on November 17?

A. Well, the last conference I had with these people was on the Monday preceding the petition.

Q. Now, up to that point what, if anything, had you accomplished?

A. I had succeeded in effecting a settlement of 50 per cent, which all the creditors agreed to receive and the debtor corporation had agreed to pay.

Q. Who on behalf of the creditors accepted that settlement?

A. The Creditors' Committee.

Q. Name them, please?

[fol. 49] A. S. B. Miller; Mr Berkow—I think he is with L. & E. Stern—that is the Century Factors; Mr. Abraham Davis; and several other representatives of the creditors of the corporation.

Q. Was that acceptance in writing or oral?

A. The acceptance was oral.

Q. And when was the 50 per cent to be paid?

A. In cash upon the receipt of the signatures of all creditors of the corporation accepting such settlement.

Q. In other words, you had not yet submitted the proposition to the individual creditors?

A. We had not.

Q. When you say that the creditors had accepted that proposition——

A. (Interrupting) The Committee of Creditors.

Q. You mean merely the Creditors' Committee had accepted the proposition?

A. That is right.

Q. Well, do you happen to know why a bankruptcy petition was filed?

A. I do not.

Q. At those various conferences with the Creditors' Committee and the members of the various associations, did you advise those individuals that you had received $2,500?

A. I did.

Q. When was that information imparted to them?

A. At the first meeting I had, I told them my fees had been paid.

Q. Did they make any statement in that connection?

A. No.

Q. Do you know who the John I. Hart Corporation is?

A. I do not.

Q. Do you know what their business is?

A. I do not.

Q. Do you know what suits were pending against the corporation at the time of your retention?

A. I do not.

[fol. 50] Q. Do you know whether there were any?

A. I do not.

Q. Was that matter discussed?

A. No.

Q. Was there any statement made to you as to why it was necessary for Mr. Bell to take up the question of settlement?

A. Well, because his funds were not in liquid condition.

Q. Were any creditors pressing him?

A. When?

Q. At the time of your first conference?

A. No.

Q. Wasn't it on account of their insistence upon collection that he came to you?

A. I don't know.

Q. That matter was never discussed?

A. No.

—— ——.

Subscribed and sworn to before me this — day of ——, 1931. —— ——, Referee.

(At 3.50 P. M. adjourned to Monday, May 25, 1931, at 3 P. M.)

[fol. 51] TRUSTEE'S EXHIBIT 9—July 23, 1931

John I. Hart Corporation, 119 West 40th Street

New York, Nov. 3, 1930. No. 1752.

Pay to the order of David Bell Scarves, Inc., $2,500.00/-100, exactly $2,500 & 00 ct. dollars.

John I. Hart Corporation. Milt L. Ernst, V.-Pres.
S. F. Feigenbaum, Secy.

Sterling National Bank & Trust Company of New York, 42nd Street at Lexington Avenue.

(On side of check:) This check is issued in payment of items as per statement following. Endorsement of payee will constitute a receipt in full.

Date: 11/3/30. Amount: 2,500.

(Endorsed on back:) David Bell Scarves, Inc. For Deposit. Conrad, Rubin & Lesser, Attorneys. Pay to the Order of the Chase National Bank of New York. Nov. 5, 1930. Prior Endorsements Guaranteed. Lawyers Trust Company.

[fol. 52] TRUSTEE'S EXHIBIT 10—July 23, 1931

Order appointing the Irving Trust Company receiver in bankruptcy, signed by Robert P. Patterson, District Judge, on November 17, 1930. The final report and accounting of the Irving Trust Company, Receiver, indicates:

Total amount of cash which came into its hands	$19,475 35
Balance turned over to Horace G. Pender, Trustee	18,304 61
Receiver's statutory commissions	334 19

The Referee's report on the receiver's accounting sets forth the following allowances:

Irving Trust Company, Receiver	$334 19
Krause & Hirsch, Esqs., Attorneys for receiver	500 00
Eugene V. King, Esq., Attorney for petitioning creditors	60 00
Bernard A. Grossman, Esq., Attorney for bankrupt	65 00
Aronson & Oresman, Accountants	300 00
Appraisers	60 00

Edward M. O. Pratt, as attorney for bankrupt, praying for additional allowance of $500.00; consideration deferred until final meeting of creditors, on the objection of receiver's counsel.

The order of Hon. Robert P. Patterson, District Judge, dated March 10, 1931, confirmed the referee's report and directed payment of allowances as set forth therein.

[fol. 53] IN UNITED STATES DISTRICT COURT

[Title omitted]

MEMORANDUM OF REFEREE ON MOTION OF TRUSTEE TO RE-EXAMINE FEE OF ATTORNEYS, CONRAD, RUBIN & LESSER

The undersigned Referee is of the opinion that the fee having been paid in contemplation of bankruptcy, as set forth in the decisions, that the fair and reasonable value of the services rendered is not in excess of $500.

An order should therefore be made directing the repayment of $2,000 to the Trustee in Bankruptcy.

Settle order on notice.

Dated August 14, 1931.

Oscar W. Ehrhorn, Referee in Bankruptcy.

[fol. 54] IN UNITED STATES DISTRICT COURT

[Title omitted]

PROPOSED ORDER SUBMITTED BY RESPONDENTS ON TRUSTEE'S APPLICATION

An application having been made by Horace G. Pender, trustee, for a re-examination pursuant to Sections 60d and 67e of the Bankruptcy Act of a fee of $2,500.00 paid to Conrad, Rubin & Lesser, and the said application having duly come on to be heard, and the said Conrad, Rubin & Lesser having appeared and objected to the jurisdiction of the referee and having, upon due notice, moved for a dismissal of the petition upon the ground that the said petition and each count thereof fails to state facts sufficient to constitute a claim within the jurisdiction of the referee and in support of the said motion having submitted an affidavit of William W. Conrad, verified June 30th, 1931, and the second count of the petition having been withdrawn by the petitioner, and the undersigned having thereupon denied said motion to dismiss and having overruled the objections to the jurisdiction of the referee, and said Conrad, Rubin & Lesser having duly excepted to the said determination and having declined to subject themselves to the jurisdiction of the referee,

Now, upon reading and filing the notice of motion herein dated May 26th, 1931, and the petition of Horace G. Pender, [fol. 55] verified May 29th, 1931, in support of said application and the cross notice of motion for a dismissal thereof dated June 13th, 1931, and the affidavit of William W. Conrad verified June 30th, 1931, submitted in support of said cross-motion, and after hearing George C. Levin, Esq., in support of the said application, and Samuel Rubin, Esq., in support of said cross-motion, and the referee by a ruling made on July 17th, 1931, having overruled said ob-

jections to jurisdiction and having directed that testimony be taken upon the allegations of the petition, and the testimony of the petitioner having been duly taken and the respondents having declined to offer any testimony, and upon the opinion of the undersigned, filed August 14th, 1931, and upon motion of Krause & Hirsch, attorneys for the trustee, it is

Ordered that the said motion to dismiss the petition be and the same hereby is denied and the said objections to the jurisdiction of the referee be and the same hereby are overruled; and it is further

Ordered and adjudged that the fair and reasonable value of the services rendered by the respondents is the sum of $500.00; and it is further

Ordered that the said respondents, Conrad Rubin & Lesser, and the individuals constituting said firm, William W. Conrad, Samuel Rubin and C. F. Lesser, attorneys for David Bell Scarves, Inc., be and they hereby are jointly and severally directed within five (5) days from the entry of [fol. 56] this order and service of a copy thereof at their offices, No. 150 Broadway, in the Borough of Manhattan, City of New York, to turn over and pay to Horace G. Pender, as trustee in bankruptcy of the estate of David Bell Scarves, Inc., the sum of $2,000.00, the property of the said bankrupt estate.

Dated New York, August —, 1931.

—— ——, Referee in Bankruptcy.

In United States District Court

[Title omitted]

Order Appealed From

An application having come on before me for an order directing the re-examination pursuant to §§ 60d and 67e of the Bankruptcy Act, of a fee of $2,500.00 paid to Conrad, Rubin & Lesser,

Upon reading and filing the notice of motion, dated May 26, 1931, and the petition annexed thereto, verified by Horace G. Pender, on the 29th day of May, 1931, in support [fol. 57] thereof, and upon all the papers filed herein and

all proceedings heretofore had herein, and upon the stipulation of adjournment of said application, dated June 8, 1931, and upon the cross notice of motion of Conrad, Rubin & Lesser, dated June 13, 1931, praying for a dismissal of the said proceedings on various grounds therein stated, and upon the adjourned return date of the application, the Trustee having in open court withdrawn the second count set forth in his said objection and limiting the prayer for relief to the ground set forth in his first count based upon § 60d of the National Bankruptcy Act, and upon filing the affidavit of William W. Conrad, sworn to the 30th day of June, 1931, and Exhibit "A", thereto annexed, and the respondents having objected to the jurisdiction of this Court to entertain the application herein made, and after taking testimony before me and upon the exhibits marked in evidence on the said proceeding, and after hearing Krause & Hirsch, attorneys for the Trustee, by George C. Levin, Esq., of counsel, in support of the motion, and Conrad, Rubin & Lesser, respondents in person, by Samuel Rubin, Esq., of counsel, in opposition thereto, and due deliberation having been had, and upon the opinions of this Court filed herein on the 17th day of July and the 14th day of August, 1931, it is

Now on motion of Krause & Hirsch, attorneys for the Trustee,

Ordered that the firm of Conrad, Rubin & Lesser, and the individuals constituting said firm, William W. Conrad, [fol. 58] Samuel Rubin and C. F. Lesser, attorneys for David Bell Scarves, Inc., be and they hereby are jointly and severally directed within five (5) days after the entry of this order and service of a copy thereof at their offices, No. 150 Broadway, in the Borough of Manhattan, City of New York, to turn over and pay to Horace G. Pender, as Trustee in Bankruptcy of the estate of David Bell Scarves, Inc., the sum of $2,000.00, the property of the said bankrupt estate.

Dated New York, August 21, 1931.

Oscar W. Ehrhorn, Referee in Bankruptcy.

In United States District Court

[Title omitted]

Exceptions to Order of Referee Dated August 21st, 1931

The undersigned respondents do hereby except to the order made by Hon. Oscar W. Ehrhorn, Referee in Bankruptcy, dated the 21st day of August, 1931, in a certain [fol. 59] proceeding to re-examine a payment of $2,500.00 to the undersigned, upon the following grounds, viz., that the said order is erroneous as a matter of law in that the said proceeding brought by the Trustee to re-examine the said payment made to the respondents is not within the jurisdiction of the Referee, under Section 60d of the Bankruptcy Act.

And the undersigned prays this Court that the said exceptions may be sustained.

Dated New York, August 27th, 1931.

Conrad, Rubin & Lesser, Respondents. Office & P. O. address: 150 Broadway, Borough of Manhattan, City of New York.

[fol. 60] In United States District Court

[Title omitted]

Petition to Review

To the United States District Court for the Southern District of New York:

The petition of Conrad, Rubin & Lesser respectfully alleges:

Your petitioners are parties to certain proceedings brought by the Trustee herein for the re-examination of a payment of $2,500.00 made to your petitioners.

That your petitioners appeared in said proceedings and upon due notice to the attorneys for the Trustee moved to dismiss the said proceeding upon the ground that the same was not within the jurisdiction of the Referee.

That the said matter came on for hearing before Hon. Oscar W. Ehrhorn as Referee in Bankruptcy and after

such hearing the said Referee overruled the objections made by your petitioners to the jurisdiction of the Referee and directed that the said proceedings be continued for the purpose of re-examining the said payment to your petitioners. That your petitioners duly excepted to said rul- [fol. 61] ing and declined to submit to the jurisdiction of the Referee and thereupon proceedings were had and testimony taken on the part of the Trustee and an order thereafter entered, dated August 21st, 1931, directed your petitioners to turn over and pay to the Trustee the sum of $2,000.00, to which order your petitioners have duly excepted.

That said order is erroneous in that the proceedings herein do not come within the scope of Section 60d of the Bankrupptcy Act by reason of the fact that the services rendered by your petitioners, for which compensation was paid prior to the filing of the petition in bankruptcy, were not services germane to the purposes of the Bankruptcy Act and were not within the purview of Section 60d of the Bankruptcy Act.

Wherefore your petitioners pray that the said order be reviewed and reversed and that the said proceeding be dismissed as not within the jurisdiction of the Referee.

Dated New York, August 27th, 1931.

Conrad, Rubin & Lesser, Petitioners on Review, by William W. Conrad.

Duly sworn to by William W. Conrad. Jurat omitted in printing.

[fol. 62] In United States District Court

[Title omitted]

Referee's Certificate on Petition for Review

To the Honorable Judges of the District Court of the United States for the Southern District of New York:

I, Oscar W. Ehrhorn, Referee in Bankruptcy in charge of this proceeding, do hereby certify:

That in the course of such proceeding, an order hereinafter referred to was made and entered on the 21st day of August, 1931.

[fol. 63] That Conrad, Rubin & Lesser, Esqs., feeling aggrieved thereat, have filed a petition for review, which was granted.

That the errors complained of are set forth in such petition for review.

Pursuant to provisions of General Order XXVII, I hereby certify that the question presented is whether the Bankruptcy Court had jurisdiction to re-examine the fee of the respondent attorneys Messrs. Conrad, Rubin & Lesser. The undersigned respectfully refers to his memoranda opinions which memoranda are dated respectively July 17th, 1931, and August 14th, 1931.

I hand up for the information of the Judges, the following papers:

(1) Notice of motion and petition to re-examine Attorneys' Fee filed June 22nd, 1931.

(2) Stipulation of Attorneys consenting to adjourn hearing from June 8th, 1931, to June 22nd, 1931.

(3) Notice of motion of Messrs. Conrad, Rubin & Lesser, filed June 22nd, 1931.

(4) Stenographer's Minutes, pages 1 to 3.

(5) Affidavit of Respondents filed July 2nd, 1931.

(6) Memorandum of Referee on objection to jurisdiction of Referee made by respondents to Trustee's Motion to Review Attorneys' Fee, pursuant to Section 60-D of Bankruptcy Act, dated July 17th, 1931.

(7) Stenographer's Minutes of July 23rd, 1931, pages 1 to 10.

(8) Minutes of adjourned first meeting, dated May 18th, 1931, pages 85 to 98.

[fol. 64] (9) Memorandum of Referee on Motion of Trustee to re-examine fee of attorneys, Messrs. Conrad, Rubin & Lesser.

(10) Proposed order signed by Referee directing respondents to pay Trustee $2,000.00 dated August 21st, 1931.

(11) Exceptions to order of Referee dated August 21st, 1931.

(12) Petition to Review of Messrs. Conrad, Rubin & Lesser.

Pursuant to the practice duly adopted, I direct that the hearing on the petition for review be had before the Honorable District Judge holding the Bankruptcy Part, on Wednesday, September 9th, 1931.

I hereby certify that copies of this Certificate have been mailed to Messrs. Conrad, Rubin & Lesser, respondents, and to Messrs. Krause & Hirsch, attorneys for the Trustee, herein.

Dated August 29th, 1931.

Oscar W. Ehrhorn, Referee in Bankruptcy.

[fol. 65] In United States District Court, Southern District of New York

In Bankruptcy. No. 49939

In the Matter of David Bell Scarves, Inc., Bankrupt

Order Confirming Order of Referee, etc.

A petition having been filed herein on behalf of Conrad, Rubin & Lesser to review a certain order of Hon. Oscar W. Ehrhorn, dated the 21st day of August, 1931, directing the firm of Conrad, Rubin & Lesser and the individuals constituting the said firm, within five days after the entry of the said order, to turn over and pay to Horace G. Pender, as Trustee in Bankruptcy of the above-named estate, the sum of Two Thousand ($2,000.00) Dollars,

Now upon reading and filing all of the papers enumerated in the said order of Hon. Oscar W. Ehrhorn, dated the 21st day of August, 1931, and the testimony taken in connection therewith, together with the exhibits therein referred to, and all papers heretofore filed herein, and the petition to review herein of the said Conrad, Rubin & Lesser, verified the 27th day of August, 1931, by William W. Conrad, and the exceptions to the said order of the Referee dated the 29th day of August, 1931, and the opinions of the said Referee dated the 17th day of July, and the 14th day of August, 1931,

And after hearing Conrad, Rubin & Lesser, Esqs., respondents in person, by Samuel Rubin, of counsel, in sup-[fol. 66] port of the said petition to review, and Krause & Hirsch, Esqs., attorneys for the Trustee, by George C. Levin, of counsel, in opposition thereto, and due deliberation having been had, and upon the opinion of this Court filed the 25th day of September, 1931, it is

Now on motion of Krause & Hirsch, attorneys for the Trustee herein,

Ordered that the order of Hon. Oscar W. Ehrhorn, Referee in Bankruptcy herein, dated the 21st day of August, 1931, be and the same hereby is in all respects confirmed, and it is further

Ordered that the petition to review filed herein on or about the 27th day of August, 1931, be and the same hereby is dismissed, and it is further

Ordered that the firm of Conrad, Rubin & Lesser, and the individuals constituting said firm, namely, William W. Conrad, Samuel Rubin, and Claire F. Lesser, attorneys for David Bell Scarves, Inc., be and they hereby are jointly and severally directed within five days after the entry of this order and service of a copy thereof, upon them at their offices, No. 150 Broadway, in the Borough of Manhattan, City of New York, to turn over and pay to Horace G. Pender, as Trustee in Bankruptcy of the estate of David Bell Scarves, Inc., the sum of $2,000.00, the property of the said bankrupt estate.

Dated New York, October 1st, 1931.

Francis G. Caffey, U. S. D. J.

[fol. 67] In United States District Court, Southern District of New York

In Bankruptcy. #49939

In the Matter of David Bell Scarves, Inc., Bankrupt

Opinion of Francis G. Caffey, D. J.

It is clear and, I believe, it is without dispute that the words "in contemplation of the filing of a petition by or against him" contained in Section 60 (d) of the Bankruptcy Act relate only to the state of mind of the debtor and not to what his lawyer thinks about (Tripp v. Mitschrich, 211 Fed. 424, 427; Quinn v. Union Nat. Bank, 32 Fed. [2d] 762, 767).

With respect to compensation of lawyers, the courts are in irreconcilable conflict upon the question as to whether or not sections 60 (d) and 64 (b) 3 are completely cor-

relative—the one applying preceding and the other applying subsequent to the filing of the petition. So far as I can discover the Supreme Court has not settled the dispute. For the present purpose it would be useless to discuss all the cases. The authorities seem to agree, however, that services, the determination of whose value is within the summary jurisdiction conferred by Section 60 (d), must be of a type which renders them germane to the general aims of the Bankruptcy Act (see In re Rolnick, 294 Fed. 817, 819-0; In re Falk, 30 Fed. [2d] 607, 609). The problem is to ascertain in each instance whether the particular serv-[fol. 68] ices involved are, in the sense of this expression, germane to the general aims of the statute.

The testimony of one of the respondents himself is to the effect that his firm was retained a few days before the filing of the bankruptcy petition (after serious financial difficulties of the debtor intervened); also that the services were to consist of negotiating for a settlement with creditors and, in the event of settlement, of attempting to arrange for raising the money needed to carry it out. While the line of demarcation is drawn between the two sections, so far as concerns the time element, at the date of bankruptcy (In re Rolnick, 294 Fed. 817, 819-0; In re Klein-Moffett Co., 27 Fed. [2d] 444), and to that extent the two provisions of law are correlative, nevertheless under Section 60 (d) the question persists, were the services germane to the general aims of the Bankruptcy Act? Whatever other tests there may be, if the services were germane, summary jurisdiction is conferred by Section 60d.

In In re Cummins, 196 Fed. 224, 226, and In re Klein-Moffett Co., 27 Fed. (2d) 444, 445, it was said in substance that services to bring about a settlement so as to avoid bankruptcy, and services in obtaining fresh money to enable the failing debtor to continue in business were germane to the general aims of the Bankruptcy Act. If this be true, then the value of the services may be adjudicated under Section 60 (d).

The inclusion in Section 60 (d) of various narrative words to describe lawyers, e. g. solicitors in equity, proctor in admirality, etc.—seems to me to negative the motion that the character of the services covered by it are identical [fol. 69] with services covered by Section 64 (b) 3, differing only as to date of rendition—the former dealing with

those preceding filing of the petition and the latter with those following filing of the petition. It is hardly to be conceived that Congress contemplated that solicitors in equity or proctors in admiralty should be engaged to perform the type of services required in administering a bankrupt estate. In consequence, I feel that the respondents are contending for an interpretation of Section 60 (d) which would eliminate or nullify some of its words.

Upon the present record, the referee was fully warranted in concluding, and I think from the circumstances that the inference is inescapable (Cf. Quinn v. Union Nat. Bank, 32 Fed. [2d] 762, 767-8), that, when the debtor engaged the respondents, he contemplated bankruptcy. Accepting the testimony of one of the respondents, it appears incontrovertibly that the employment was exclusively for the formulation of arrangements that would have adjusted affairs of the debtor in some fashion with all of his creditors and would have affected, for the benefit of the estate, all the assets of the debtor. As it seems to me, it is wholly consistent with the language of Section 60 (d) to construe the jurisdiction there conferred to embrace authority summarily to fix the reasonable value of fees for services in such matters—including attempted adjustments designed to avoid bankruptcy—and that it would render some of the language surplusage or meaningless to construe the jurisdiction as excluding this subject.

There must be plain and strong ground for depriving language of a statute of full operation before the Court is [fol. 70] justified in confining it to a field more restricted than that comprehended within the literal words. Nullification of the words in the statute by implication such as is sought by the argument that the two sections discussed are completely correlative, is not favored in the law. I have been unable to find any warrant for limiting the natural application of the phraseology in Section 60 (d) so as to remove from it services of the character that were performed by the respondents.

The Court of Appeals for the 8th Circuit (Tripp v. Mitschrich, 211 Fed. 424, 427), pointed out in 1914 that the words of the Federal Revenue Act "in contemplation of death" as to testimentary gifts are of import similar to the words of the Bankruptcy Law with which we are not concerned. Since then the Supreme Court (United States

v. Well, 283 U. S. 102), has definitely settled that this expression in the tax law means that the thought of death was the impelling motive. I think it is clear here that the thought of bankruptcy was the impelling motive of the debtor when he retained the respondents.

Referee's order confirmed.

Dated September 25th, 1931.

Francis G. Caffey, U. S. D. J.

[fol. 71] In United States District Court

[Title omitted]

Assignment of Errors

Now come William W. Conrad, Samuel Rubin and C. F. Lesser, and make and file this, their assignment of errors.

That the Court erred in this order in each of the several respects hereinafter specifically enumerated:

1. In making the order dated October 1st, 1931, confirming the report of Hon. Oscar W. Ehrhorn, referee in bankruptcy, dated August 21st, 1931.

2. In dismissing the petition for review filed herein on the 27th day of August, 1931.

3. In directing the said William W. Conrad, Samuel Rubin and C. F. Lesser to turn over and pay to Horace G. Pender, as trustee in bankruptcy, the sum of $2,000.00.

4. In holding that the referee and the said United States District Court had jurisdiction under Section 60d of the Bankruptcy Act to re-examine the payment of $2,500.00 to the said Conrad, Rubin & Lesser.

5. In holding that the services rendered by the said Conrad, Rubin & Lesser were within the scope of the provisions of Section 60d of the Bankruptcy Act and were subject to [fol. 72] review and re-examination.

6. In denying the application of the said Conrad, Rubin & Lesser to dismiss the petition filed by the trustee in bankruptcy for a review and re-examination of said payment.

7. In resolving the questions of fact or law or both herein in favor of the said trustee in bankruptcy.

8. In holding that the services rendered by the said Conrad, Rubin & Lesser were germane to the purposes of the Bankruptcy Act and as such, were subject to review and re-examination by the Court and/or referee.

Wherefore the said William W. Conrad, Samuel Rubin and C. F. Lesser pray that the order of the United States District Court for the Southern District of New York, dated October 1st, 1931, be reversed and the said petition by the trustee to re-examine said payment and to direct the repayment of any part thereof be dismissed in accordance with law.

Dated New York, October 30th, 1931.

Conrad, Rubin & Lesser, Petitioners in Person.
Office & P. O. address: 150 Broadway, Borough of Manhattan, City of New York.

[fol. 73] In United States Circuit Court of Appeals, Second Circuit

[Title omitted]

Stipulation as to Exhibits

It is hereby stipulated and agreed by and between the parties to this appeal, for the purpose of shortening the record, that the printing of Trustee's Exhibits 1, 5 (marked for identification), 6, 7 and 10, in full, be waived and that statements of the material portions may be used in lieu thereof; and

It is further stipulated and agreed that in the event that at the argument of this appeal, reference to the said exhibits becomes necessary, either party may refer to the originals with the same force and effect as if produced as part of this record.

Dated New York, April 4, 1932.

Krause, Hirsch & Levin, Attorneys for Respondent.
Conrad, Rubin & Lesser, Attorneys for Appellants.

[fol. 74] In United States District Court

[Title omitted]

Stipulation as to Record

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court of the United States for the Southern District of New York in the above-entitled matter as agreed on by the parties hereto.

Dated New York, April 26th, 1932.

Krause & Hirsch, Attorneys for Trustee. Conrad, Rubin & Lesser, Appellants.

[fol. 75] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 76] In United States Circuit Court of Appeals for the Second Circuit, October Term, 1932

No. 49

Argued October 19, 1932. Decided November 14, 1932

In the Matter of David Bell Scarves, Inc., Bankrupt; Conrad, Rubin & Lesser, Appellants; Horace G. Pender, Trustee in Bankruptcy, Appellee

Appeal from the District Court of the United States for the Southern District of New York

Before L. Hand, Swan, and Augustus N. Hand, Circuit Judges

From an order directing the appellants to pay over to the trustee in bankruptcy a sum of money representing part of an attorney's fee paid to them by the bankrupt for services to be rendered, they have appealed. Affirmed.

For opinion below, see (D. C.) 52 F. (2d) 755.

Conrad, Rubin & Lesser, of New York City (Samuel Rubin, of New York City, of counsel), for appellants.

Krause, Hirsch & Levin, of New York City (George C. Levin, of New York City, of counsel), for appellee.

OPINION

SWAN, Circuit Judge:

This proceeding was initiated by the trustee's notice of motion and petition for re-examination under section 60d of the Bankruptcy Act (11 U. S. C. A. §96 (d)) of a $2,500 retainer paid to the appellants by the bankrupt corporation twelve days before an involuntary petition in bankruptcy was filed against it. Upon the return of the trustee's motion and petition, the appellants objected to the jurisdiction of the referee, but the objection was overruled, and, after a hearing in which the appellants refused to take part, an order was entered directing them to return to the trustee the sum of $2,000. The order of the referee was confirmed by the District Court, and from the latter order this appeal was taken. The sole issue it presents is of the jurisdiction of the referee to re-examine the payment under the circumstances disclosed.

The corporation was in financial difficulties and unable to meet its maturing obligations. Prior to retaining the appellants, it had engaged another attorney, Mr. Pratt, to negotiate a settlement with its creditors, and a meeting with some of its creditors had been held. Apparently the appellants were retained to supplement the efforts of Mr. Pratt, to whom $750 had already been paid upon a promised fee of $2,000. Mr. Conrad's testimony, given at an examination under section 21a, Bankr. Act (11 U. S. C. A. §44 (a)), was to the effect that he was to negotiate with creditors for a 50 per cent cash settlement and was to assist the corporation in hypothecating its accounts receivable in order to obtain the necessary money to carry out such a settlement. His affidavit, submitted in opposition to the referee's jurisdiction, states that the most extreme course which was within the contemplation of himself and Mr. David Bell, the bankrupt's president, was continuance of the business under an equity receivership, although that course was not contemplated if the business could be continued under the supervision of a committee of creditors,

or a representative of the New York Creditors' Adjustment Bureau, Inc. It also appears that within two weeks [fol. 77] prior to November 5th, when the appellants' retainer was paid, David Bell had withdrawn $1,500 from the corporation, and his brother, who was an employee, had withdrawn $750. The cash resources of the corporation were so low that the appellants' retainer could not be paid until a sale of merchandise was made; the purchaser's $2,500 check was then indorsed to the appellants. Upon these facts the District Court concluded that the thought of bankruptcy was the impelling motive of the debtor corporation when its president retained the appellants. Hence the payment was held subject to summary re-examination.

The section under consideration reads as follows:

"(d) If the debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney and counselor at law, solicitor in equity or proctor in admiralty for services to be rendered, the transaction shall be re-examined by the court on petition of the trustee or any creditor and shall only be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate."

In re Wood & Henderson, 210 U. S. 246, 28 S. Ct. 621, 52 L. Ed. 1046, has authoritatively settled that this section justifies summary proceedings and a readjustment of the attorney's compensation if the facts present a case within its terms. When a debtor is in such straits that he knows he is likely to end in the bankruptcy court and he engages an attorney to take steps to prevent it, a payment in advance for services of that character would seem clearly to fall within the literal terms of the statute; the payment is made "in contemplation of" bankruptcy no less when made to fend against it than when made to bring it about.

It is true, however, that the section has not received a uniform interpretation by the courts, as this court recognized in Re Falk, 30 F. (2d) 607, 609, and there are numerous dicta and a few decisions which seem to limit the literal language of the section. In an early case, In re Kross, 96 F. 816 (D. C. S. D. N. Y.), the question involved was the allowance of a fee under section 64b (3), 11 U. S. C. A.

§ 104 (b) (3), and in deciding it Judge Brown remarked that section 60d must be read with section 64b (3), and that both relate to the same character of services. It is generally agreed that the services for which an allowance may be made under section 64b (3) must be such as relate to "the performance of the bankrupt's duty in aid of the estate and its administration." In re Kross, 96 F. 816 (D. C. S. D. N. Y.); In re Mayer, 101 F. 695 (D. C. S. D. Wis.); In re Rosenthal & Lehman, 120 F. 848 (D. C. E. D. Mo.); In re Christianson, 175 F. 867 (D. C. D. N. D.); In re Malkiel, 29 F. (2d) 790 (D. C. D. Mass.); Remington, Bankruptcy (3d Ed.) § 2726. Services which benefit only the bankrupt are not entitled to priority of payment out of the estate. Randolph v. Scruggs, 190 U. S. 533, 539, 23 S. Ct. 710, 47 L. Ed. 1165. But we find nothing in the statute to limit the services, payment for which in advance is examinable under section 60d, to services of the same character as are allowable under section 64b (3). The former relates only to services to be rendered before bankruptcy is instituted, In re Rolnick, 294 F. 817 (C. C. A. 2); the latter in general to services after petition filed. Indeed, the reference in section 60d to solicitors in equity and proctors in admiralty clearly implies that the character of the services with which that section deals is not so limited. See Pratt v. Bothe, 130 F. 670, 673 (C. C. A. 6); Furth v. Stahl, 205 Pa. 439, 55 A. 29. However, even though Judge Brown's dictum be repudiated, there remain several other opinions that import into section 60d a requirement that the services for which compensation is allowable thereunder shall be such as are "germane to the aims of the Bankruptcy Act." See In re Habegger, 139 F. 623, 3 Ann. Cas. 276 (C. C. A. 8); In re Stolp, 199 F. 488 (D. C. E. D. Wis.); In re Rolnick, 294 F. 817 (C. C. A. 2); Quinn v. Union Nat. Bank, 32 F. (2d) 762, 765 (C. C. A. 8); In re Lang, 20 F. (2d) 239, 241 (D. C. E. D. Pa.). Upon these authorities the appellants base their contention that a payment for services not "germane" is not examinable under section 60d.

These cases furnish very slight support for such contention. With the possible exception of In re Stolp, they did not discuss the question of jurisdiction. On the contrary, they assumed that the payments attacked might be re-examined, apparently no objection having been made to

jurisdiction, and they declare that only for "germane" services could any compensation be allowed. The appellants argue that "it must necessarily follow" from the rule that only payments for "germane" services are protected that jurisdiction to re-examine a payment for services not [fol. 78] "germane" is lacking. This appears to be a plain non sequitur. The premise is that, as to services in no way beneficial to the estate or connected with the duties of a bankrupt, no compensation is allowable. The conclusion need not be, as the appellants urge, that none of the retainer is recoverable by the trustee under section 60d; rather it may be that the whole of it is recoverable, as In re Habegger seems actually to have held. As the court pointed out in Tripp v. Mitschrich, 211 F. 424, #428 (C. C. A. 8), it is necessary to distinguish between what is re-examinable and what is allowable. "The former relates to jurisdiction; the latter assumes jurisdiction and inquires what is a proper charge." With the validity of the appellants' premise we are not now concerned. An allowance of $500 has been granted them, and no one questions it. Even assuming the validity of the premise, we cannot accede to the conclusion asserted to follow from it.

Section 60d would seem to require that, regardless of the nature of the services to be rendered, any retainer paid to an attorney when the debtor's impelling motive in paying it was the thought of the imminency of bankruptcy, should be subject to re-examination by the court. Whether upon such re-examination the court should allow him to keep a part of the retainer as a reasonable compensation for services actually rendered, even though the services were of a character that could not be of advantage to the creditors, such as defending the debtor against a charge of crime, we need not now say. Nor need we even go so far as to decide that a retainer for services of that character is subject to re-examination. All we need hold is that a retainer to negotiate a settlement with creditors, if made in contemplation of bankruptcy, is re-examinable. With the exception of In re Habegger (C. C. A.) 139 F. 623, 3 Ann. Cas. 276 (which allowed recovery of the full amount paid) no case has suggested that such services are not "germane" to bankruptcy, if that be necessary, and several cases have in fact re-examined retainers paid for similar services. In re Habegger, supra; Slattery v. Dillon,

17 F. (2d) 347 (C. C. A. 9); In re Lang, 20 F. (2d) 239 (D. C. E. D. Pa.); In re Klein Moffett Co., 27 F. (2d) 444 (D. C. D. Md.); In re Cummins, 196 F. 224 (D. C. S. D. N. Y.); Furth v. Stahl, 205 Pa. 439, 55 A. 29. See, also, Tripp v. Mitschrich (C. C. A.) 211 F. 424, 430. In Slattery v. Dillon, the jurisdiction of the referee was expressly challenged; in the other cases cited it does not appear that objection to jurisdiction was raised. That the retainer in the case at bar was paid in contemplation of bankruptcy seems too clear to admit of controversy. When the client and attorney are considering an equity receivership in case the creditors will not accept an offered settlement, it is inconceivable that the imminence of bankruptcy and the avoidance of it is not present in their thoughts.

Order affirmed.

[fol. 79] In United States Circuit Court of Appeals, Second Circuit

In the Matter of David Bell Scarves, Inc., Bankrupt; Conrad, Rubin and Lesser, Appellants

Decree—Filed Nov. 21, 1932

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be, and it hereby is, affirmed, with costs.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 80] [File endorsement omitted.]

[fol. 81] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 82] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 27, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 37,415. U. S. Circuit Court of Appeals, Second Circuit. Term No. 718. Conrad, Rubin & Lesser, petitioners, vs. Horace G. Pender, trustee in bankruptcy. Petition for a writ of certiorari and exhibit thereto. Filed February 21, 1933. File No. 37,415.

No. 718

FEB 21

CHARLES ELM

Supreme Court of the United States

In the Matter

of

The Petition of WILLIAM W. CONRAD, SAMUEL RUBIN and CLAIRE F. LESSER for a writ of certiorari directed to the Circuit Court of Appeals for the Second Circuit to bring before the Supreme Court the case of

MATTER OF DAVID BELL SCARVES, INC.,

Bankrupt.

CONRAD, RUBIN & LESSER,

Appellants,

HORACE G. PENDER,

Trustee in Bankruptcy, Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

DAVID J. COLTON,

Attorney for Petitioners.

THE COURT PRESS, INC.

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Supreme Court of the United States

In the Matter

of

The Petition of WILLIAM W. CONRAD, SAMUEL RUBIN and CLAIRE F. LESSER for a writ of certiorari directed to the Circuit Court of Appeals for the Second Circuit to bring before the Supreme Court the case of

MATTER OF DAVID BELL SCARVES, INC.,

Bankrupt.

CONRAD, RUBIN & LESSER,

Appellants,

HORACE G. PENDER,

Trustee in Bankruptcy, Respondent.

To the Honorable Justices of the Supreme Court of the United States of America:

The petition of William W. Conrad, Samuel Rubin and Claire F. Lesser respectfully alleges:

1. That your petitioners, at the time of the commencement of these proceedings, were and now are residents of the State of New York, and the respondent was and is a resident of the State of New York.

2. Your petitioners are attorneys at law engaged in the practice of law in the City of New York. This proceeding involves the question of the jurisdiction of a referee in bankruptcy under §60d of the Bankruptcy Act, to re-examine the payment of certain fees to your petitioners for services

rendered to David Bell Scarves, Inc., a New York corporation, prior to the filing of a petition in bankruptcy against that corporation.

3. On October 31st, 1930, William W. Conrad, one of your petitioners, was consulted by David Bell, an officer of David Bell Scarves, Inc., in connection with matters relating to the financial condition of that corporation. It appears that the corporation had suffered large operating losses during the preceding six month period (Record, fol. 41). The condition of the business as of September 30th, 1930, the date of the most recent balance sheet (Record, fol. 52) indicated that the corporation had total assets of $65,827.90, of which about $6,000.00 was cash, $19,000.00 accounts receivable, $24,000.00 merchandise and $15,000.00 machinery and fixtures. The liabilities totalled $53,186.19, of which about $45,000.00 were accounts payable, $4,000.00 loans payable and $3,000.00 other obligations.

4. Your petitioners point out that that balance sheet (the correctness of which has never been questioned) indicated a solvent, but nevertheless unliquid, condition, a substantial portion of the assets being merchandise, machinery and equipment. Your petitioners having had considerable experience in such matters, they were retained by the corporation to conduct negotiations with the corporation's creditors and to endeavor to procure funds by the hypothecation of the accounts receivable in order to effectuate a reorganization of the corporation and a settlement with its creditors (Record, fols. 121, 132 and 133). Your petitioners agreed to perform such services for a fee of $2,500.00 which was paid on November 3rd, 1930 (Exhibit 7, Record, p. 51).

5. Your petitioners during the period between October 31, 1930, and November 17, 1930, were in practically continuous conferences with creditors and trade associations

representing creditors, some lasting until late hours of the evening (Record, fol. 125). As a result of these negotiations arrangements were made tentatively through a committee working in cooperation with the National Credit Men's Association for an adjustment of the corporation's obligations at 50% to be paid in cash (Record, fol. 144). The creditors' committee had, from the inception, been fully advised of the fees paid to your petitioners (Record, fol. 146).

6. After the foregoing arrangements had been worked out, and on November 17, 1930, three creditors saw fit to file an involuntary petition in bankruptcy against the corporation and it was, on November 21, 1930, adjudicated a bankrupt (Record, fol. 17). It appears that the claims filed total $50,174.45 (Record, fol. 115), and that the forced liquidation in bankruptcy realized less than $20,000.00 (Record, fol. 154), indicating a dividend of from 30 to 33⅓.

7. Your petitioners' functions were to endeavor to continue the corporation's business as a going concern and avoid the necessity of a forced liquidation which would be destructive both to the corporation and the interests of its creditors. The filing of a petition in bankruptcy destroyed the value of your petitioners' efforts which would have brought to the creditors an immediate payment of a sum substantially in excess of that which will ultimately be paid through the forced and destructive liquidation of the corporation's business in bankruptcy.

8. Upon the appointment of a trustee in bankruptcy, an application was made under Section 60d of the Bankruptcy Act to re-examine the payment made to your petitioners. Upon the hearing held before the Referee in Bank-

ruptcy, your petitioners objected to the jurisdiction of the Referee in that:

(a) The payment was not made in contemplation of the filing of a petition in bankruptcy by or against the corporation; and

(b) Because the services rendered by your petitioners were not such as were germane to the provisions of the Bankruptcy Act, and hence were not subject to re-examination and review in the summary manner provided for by Section 60d of that Act.

8a. The sole question presented in this proceeding is the construction of the provisions of Section 60d of the Bankruptcy Act. No question of the value of your petitioners' services is raised, your petitioners having, throughout the proceeding taken the position that the services rendered by them were not of such nature as to justify payment or allowance out of the bankrupt estate either under Section 60d or Section 64b (3).

9. The learned Referee, in spite of your petitioners' contention that no claim was made by them that their services were such as were entitled to payment under Section 60d, rejected your petitioners' contention that the services rendered were not within the scope of that Section and allowed your petitioners $500.00 for such services rendered by them and directed that they repay to the Trustee the sum of $2,000.00 as the property of the bankrupt estate (Record, fol. 172).

10. Upon petition to review the Referee's order, the same was confirmed by District Judge Francis G. Caffey, and upon leave granted by the Circuit Court of Appeals for the Second Circuit, an appeal was taken to that Court which affirmed the order of the District Court (Record, fol. 193).

11. The learned Judges of the Circuit Court of Appeals held, in an opinion written by Swan, *C. J.*, that the Court has jurisdiction to re-examine under Section 60d, even though the services which your petitioners were employed to render might not themselves be subject to any allowance. The Court rejected your petitioners' contention that where such services are of a nature not germane to the purposes of the Bankruptcy Act, they are not subject to summary re-examination by the Bankruptcy Court. Judge Swan's opinion reads in part as follows:

> "The appellants argue that 'it must necessarily follow' from the rule that only payments for 'germane' services are protected, that jurisdiction to re-examine a payment for services not 'germane' is lacking. This appears to be a plain *non-sequitur*. The premise is that as to services in no way beneficial to the estate or connected with the duties of a bankrupt, no compensation is allowable. The conclusion need not be, as the appellants urge, that none of the retainer is recoverable by the trustee under section 60(d); rather it may be that the whole of it is recoverable, as *In re Habegger* seems actually to have been held."

12. Your petitioners respectfully point out that this Honorable Court has definitely held that under Section 60d of the Bankruptcy Act, only such services as are beneficial to the estate are subject to compensation and that services rendered to a person who is subsequently adjudicated a bankrupt, of a different nature, such as the preparing of an assignment for the benefit of creditors, or endeavoring to resist adjudication, are not within the provisions of Section 60d.

In re Wood, 210 U. S. 246;
Matter of Randolph, 190 U. S. 533.

13. So far as your petitioners are able to ascertain, this Honorable Court has not passed upon the question whether the proper construction of Section 60d with respect to the jurisdiction to re-examine limits such jurisdiction to such cases as involve services which are subject to compensation. In this case, it is respectfully pointed out that Section 60d is one enacted for the protection of attorneys as well as of bankrupt estates, in that payments made to attorneys within the scope of the Section are protected against attack upon the ground that they constitute preferences. The question presented is whether the Court's jurisdiction to re-examine is to be construed as being broader than the Court's authority under the Section to make allowance for services rendered, the latter being concededly limited, under the decisions of this Court, to services which are of a nature beneficial to the estate. For example in the case of *In re Rolnick,* 294 Fed. 817 (Circuit Court of Appeals, Second Circuit) it was held that fees paid for the purpose of representing a debtor, who subsequently became bankrupt, in criminal proceedings, were not within the scope of Section 60d and were not subject to any compensation whatsoever thereunder. The Court, in that case, did not, however, pass upon the question of whether jurisdiction existed to re-examine such payment under that Section, no jurisdictional question having been raised. Such is the question now involved. In the present case your petitioners make no claim that their services were of benefit to the estate. The allowance of $500.00 was made by the learned Referee in what amounted to an *ex parte* proceeding, your petitioners resting upon their claim that the Referee lacked jurisdiction to re-examine under the circumstances.

14. Although the question has not heretofore been decided by this Court, it has been the subject of conflicting decisions in the various Circuit Courts of Appeals. It has

been held in the Eighth Circuit that no jurisdiction exists to re-examine with respect to fees paid prior to the filing of the petition in bankruptcy unless (a) the attorney was retained under circumstances which indicated a contemplation of bankruptcy and (b), that the attorney was retained to render services germane to the purposes of the Bankruptcy Act.

Tripp v. *Mitschrich,* 211 Fed. 424.

The Court, in the foregoing case, pointed out that in many of the adjudications jurisdiction had been assumed without objection, and that some of the decisions in which fees were re-examined could not be held to have bearing upon the question of the jurisdiction of the Court to so re-examine the same because no jurisdictional question was raised. In the *Tripp* case the question of jurisdiction was squarely raised and the Court held that Section 60d does not confer jurisdiction to re-examine payments of fees made under the circumstances therein disclosed. It appeared in that case that five days before the filing of an involuntary petition in bankruptcy, the bankrupt had employed an attorney to collect a fire loss upon a 30% contingent retainer. Prior to the adjudication a settlement was made with the insurance companies and the fee was retained out of the proceeds. The learned Court in the Eighth Circuit held that such fee could not be re-examined by reason of the fact that it did not fall within the scope of the provisions of Section 60d. It was similarly held in *Matter of Habegger,* 139 Fed. 623 (C. C. A. 8th Circ.) in which case it was held that services rendered by an attorney to a failing debtor in endeavoring to procure a composition with his creditors and in defending him in a criminal prosecution were not within the terms of Section 60d and hence could not be re-examined under that Section. Other decisions of similar purport are:

In re Kross, 96 Fed. 816 (D. C. S. D. N. Y.);

In re Stolp, 199 Fed. 488 (D. C. E. D. Wisc.);
In re Geller, 216 Fed. 558 (D. C. D. N. J.);
Quinn v. *Union National Bank,* 32 Fed. (2nd) 762 (C. C. A. 8th Circ.).

15. The learned Circuit Court of Appeals of the Second Circuit in the opinion in the present case recognized the diversity of opinion existing with respect to the interpretation of Section 60d. In the opinion of Judge Swan, it is stated:

> "It is true, however, that the section has not received a uniform interpretation by the courts, as this court recognized *In re Falk,* 30 F. (2d) 607, 609, and there are numerous dicta and a few decisions which seem to limit the literal language of the section. In an early case, *In re Kross,* 96 F. 816 (S. D. N. Y.), the question involved was the allowance of a fee under section 64(b) (3) 11 U. S. C. A. sec. 104 and in deciding it Judge Brown remarked that section 60(d) must be read with section 64(b) (3) and that both relate to the same character of services. * * * However, even though Judge Brown's dictum be repudiated, there remain several other opinions that import into section 60(d) a requirement that the services for which compensation is allowable thereunder shall be such as are 'germane to the aims of the Bankruptcy Act'. See *In re Habegger,* 139 F. 623 (C. C. A. 8); *In re Stolp,* 199 F. 488 (E. D. Wis.); *In re Rolnick,* 294 F. 817 (C. C. A. 2); *Quinn* v. *Union Nat. Bank,* 32 F. (2d) 762, 765, (C. C. A. 8); *In re Lang,* 20 F. (2d) 239, 241 (E. D. Pa.). Upon these authorities the appellants base their contention that a payment for services not 'germane' is not examinable under section 60(d)."

The cases to the contrary are:

In re Klein-Moffet, 27 Fed. (2nd) 444 (D. C. Md.);

Matter of Falk, 30 Fed. (2nd) 607 (C. C. A. 2nd Circ.).

16. The learned Judges of the Circuit Court of Appeals said in their opinion:

> "Section 60(d) would seem to require that, regardless of the nature of the services to be rendered, any retainer paid to an attorney when the debtor's impelling motive in paying it was the thought of the imminency of bankruptcy, should be subject to re-examination by the court. Whether upon such re-examination the court should allow him to keep a part of the retainer as a reasonable compensation for services actually rendered, even though the services were of a character that could not be of advantage to the creditors, such as defending the debtor against a charge of crime, we need not now say. Nor need we even go so far as to decide that a retainer for services of that character is subject to re-examination."

17. Your petitioners respectfully point out that the foregoing extract from the opinion of Judge Swan is inconsistent with the decisions of this Court that only services which are of advantage to the estate are within Section 60d in so far as that section authorizes allowance therefor. The necessary effect of the decision of the Circuit Court of Appeals is that all fees paid, where a bankruptcy is contemplated by the client, are subject to re-examination, even though not subject to allowance. Thus, valuable services might be rendered by an attorney, yet, when measured by the standard of advantage to the estate, must be held to be of no value and hence not subject to compensation. Such is the situation in which your petitioners find themselves. For concededly their services were not intended to be of value to the estate, should a forced liquidation be required.

18. Your petitioners further respectfully refer to the fact that the learned Circuit of Appeals held that the retainer of your petitioners was effectuated when the corporation necessarily contemplated bankruptcy proceedings. Your petitioners suggest that the record does not justify such conclusion. The condition of the business of the corporation indicated solvency, rather than insolvency, in the sense that the assets substantially exceeded the liabilities. The fact that a subsequent forced liquidation in bankruptcy realized less than 100% of the amount owing proves nothing, for such forced liquidation cannot be a proper measure of the value of the assets. The suggestion that the discussion of an equity receivership might indicate contemplation of bankruptcy is likewise without force in that such suggestion ignores the fact that an equity receivership is properly predicated upon the existence of a solvent, and not an insolvent, condition. The contemplation of the possibility (not the likelihood) of such proceeding falls far short of being a contemplation of the filing of a petition in bankruptcy by or against the debtor (the latter being the language of Section 60d).

19. Your petitioners respectfully urge that the present case is one in which it is proper for this Court to issue a writ of certiorari for the following reasons:

(a) Because of the important question of law involved, viz.: the construction of Section 60d of the Bankruptcy Act:

(b) Because the decision sought to be reviewed seems to be in conflict with the decisions of this Court to the extent that the decision of the Circuit Court of Appeals is predicated upon the theory that allowance may be made to an attorney for services rendered even though they do not benefit the bankrupt estate and hence that they are subject to re-examination;

(c) Because of the conflicting decisions in the various Circuits touching upon the questions here involved; and

(d) Because of the importance to members of the Bar and others similarly situated that their rights in connection with fees received under similar circumstances be determined.

WHEREFORE, your petitioners respectfully pray that this Honorable Court will be pleased to grant a writ of certiorari in this case to the Circuit Court of Appeals for the Second Circuit to bring this cause to this Honorable Court for such proceedings as may be just.

Dated, New York, February 20th, 1933.

WILLIAM W. CONRAD,
SAMUEL RUBIN,
CLAIRE F. LESSER.

DAVID J. COLTON,
Attorney for Petitioners.

State of New York,
County of New York—ss.:

WILLIAM W. CONRAD, SAMUEL RUBIN and CLAIRE F. LESSER, being duly sworn, each for himself, says: I have read the foregoing petition. The same is true to my knowledge, information and belief. My knowledge is derived from the record in this case and facts with which I am personally acquainted.

WILLIAM W. CONRAD,
SAMUEL RUBIN,
CLAIRE F. LESSER.

Sworn to before me this
20th day of February, 1933.

A. ALFRED CONRAD,
Notary Public,
New York County.

SUPPORTING BRIEF.

Basis for Court's Jurisdiction.

Jurisdiction in this Court is under Section 240(a) of the Judicial Code, the petition being for a Writ of Certiorari to the Circuit Court of Appeals to review an order which, under the Act of September 6th, 1916, is a final determination under the Bankruptcy Act subject to review by certiorari.

Statutory Provisions to Be Construed.

This application involves the construction of the provision of Section 60(d) of the Bankruptcy Act which reads as follows:

> "If the debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney and counselor at law, solicitor in equity, or proctor in admiralty for services to be rendered, the transaction shall be re-examined by the Court on petition of the trustee or any creditor and shall only be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate."

The Question Presented.

Briefly stated the question presented upon this application is whether or not, under Section 60(d) of the Bankruptcy Act, fees paid to an attorney for services to a corporation in connection with a proposed reorganization of the business and adjustment with its creditors, are sub-

ject to re-examination under that Section, if an involuntary petition in bankruptcy is subsequently filed, it being conceded that the services rendered were not of such nature as would be of benefit to the estate. Such services were rendered at a time when the corporation was solvent but was unable to meet its maturing obligations in cash. The facts, insofar as deemed appropriate to this application, are set forth in the foregoing petition.

The Conflicting Decisions.

Reference is made in the foregoing petition to the decisions in the various Circuits which seem to reach different conclusions with respect to the proper construction of Section 60(d).

A. *As to what constitutes contemplation of bankruptcy.*

The learned Circuit Court of Appeals in the present case indicated that the corporation must have contemplated the filing of a petition in bankruptcy. That such conclusion is not justified is borne out by a number of decisions in which it was held that the imminency of bankruptcy must be in the mind of the debtor in order to come within the provisions of Section 60(d). In *Tripp* v. *Mitschrich*, 211 Fed. 424 (C. C. A., 8th Circ.), Pope, *D. J.*, said, page 427:

> "The words 'in contemplation of bankruptcy' refer to the state of mind of the debtor, not of the attorney. This results from even a casual reading of the section. But what is meant by contemplation? We are of opinion that as here used it means more than a simple consciousness of insolvency. * * * Contemplation thus means more than the knowledge that a bankruptcy proceeding either by or against the debtor is impending. It means that in making the transfer the debtor is influenced by

> the possibility or imminence of such a proceeding. There must be some relation as of cause and effect between knowledge of his condition and the transfer."

Similarly in *In re Geller*, 216 Fed. 558 (D. C. D. N. J.), Haight, *J.*, said, page 562:

> "The fact that it might have occurred to the bankrupt, when he made the assignment, that proceedings in bankruptcy might thereafter be instituted either by or against him, and that the attorney to whom the collection of moneys was intrusted might deduct his fees therefrom, coupled with the fact that he afterwards attempted to do so, cannot be considered as a payment in contemplation of bankruptcy, such as is within the purview of Section 60d."

There are other cases of similar import referred to in the opinion of Swan, *C. J.*, submitted herewith.

B. *As to the nature of the services rendered.*

The Circuit Court of Appeals in the present case held that the right to re-examine exists regardless of the nature of the services which the attorney was engaged to render.

The Courts in other Circuits have held that the right to re-examine under Section 60(d) is limited to those cases in which the attorney is engaged to render services "germane to the purpose of the Bankruptcy Act." In *In re Stolp*, 199 Fed. 488 (D. C. E. D. Wisc.) the Court said:

> "The question as to the character of the services contemplated was directly involved in *In re Habegger* (C. C. A., 8th Circ.), 15 A. B. R. 198, 139 Fed. 623, and it was determined that they were such as were to be rendered in aid of the purpose sought to be accomplished by the Bankruptcy Act, to conserve and

> benefit the estate of the bankrupt, and therefore inure to the benefit of creditors; and accordingly a payment or transfer from a failing debtor for services to be rendered in endeavoring to get a composition with creditors, and in defending the failing debtor in a criminal prosecution, was not within the terms of this section."

The Court adopted the rule in the *Habegger* case (139 Fed. 623; C. C. A., 8th Circ.) and said:

> "I am aware that this restricted view will also affect the application of the remedy provided in section 60d strictly to such cases as appear to be payments for services to be rendered, when such services are admitted or adjudicated to be of the character specified, namely, services germane to the purposes of the Bankruptcy Act; and when it appears that the service to be rendered was not of such a character, the right to review cannot be exercised, but the transaction must either stand or be attacked under some other provision of the Bankruptcy Act."

Similarly, in *Quinn* v. *Union National Bank*, 32 Fed. (2nd) 762 (C. C. A., 8th Circ.), Kenyon, *C. J.*, said (p. 765):

> "It is the purpose of Section 60d of the Bankruptcy Act to permit a party to secure the services of attorneys to be rendered in connection with the bankruptcy proceedings, and said subdivision d relates to services germane to the bankruptcy proceedings. * * * The test laid down by Judge Adams in *Re Rosenthal and Lehman* (D. C.) 120 Fed. 849, is whether or not the services are rendered in good faith for the purpose of administering the act in a way to carry out the purpose of its enactment."

Although the Circuit Court of Appeals of the Second Circuit has heretofore held that only services germane to

the aims of the Bankruptcy Act are subject to compensation under Section 60(d), it has not, prior to the present case, held that fees paid for services rendered, of whatsoever nature, are subject to re-examination.

In *In re Rolnick*, 294 Fed. 817 (C. C. A., 2nd Circ.), the Court said, page 819:

> "The act recognizes the right of the debtor to have the aid and advice of counsel, and to make provisions for a reasonable compensation to his counsel for *services which are germane to the aims of the Bankruptcy Act*, subject, however, to the right of the Court, if the Trustee or any creditor questions the transaction to re-examine it, with a view to determining the reasonableness of the amount paid. *In re Wood*, 210 U. S. 246. *But the services to be rendered, we think, must be germane to the aims of the Bankruptcy Act and they must be rendered prior to the institution of the bankruptcy proceedings to make Section 60d applicable.*"

The effect of the decision in the instant case is to extend the scope of the application of Section 60(d) to fees paid for any legal services without extending the scope of the Court's power to make allowance for the value of the services rendered which may not be germane to the purpose of the Bankruptcy Act.

That allowance may not be made, under Section 60(d), for services other than those which are of benefit to the estate has been determined by this Court in:

> *Matter of Randolph*, 190 U. S. 533;
> *In re Wood*, 210 U. S. 246.

In the *Randolph* case it was held that services rendered by an attorney in preparing an assignment for the benefit

of creditors are not within the scope of Section 60(d). Mr. Justice Holmes said (p. 539):

> "We are not prepared to go further than to allow compensation for services which are beneficial to the estate."

Reference is made in the opinion of Swan, *C. J.*, to the conflicting decisions. It is respectfully urged that the present case is one which justifies the allowance of a writ of certiorari to the end that the applicability of Section 60(d) to cases in which attorneys are engaged to render services not in actual contemplation of bankruptcy and not for purposes germane to the aims of the Bankruptcy Act may be finally determined.

Respectfully submitted,

DAVID J. COLTON,
Attorney for Petitioners.

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Supreme Court of the United States

OCTOBER TERM, 1932—No. 718

CONRAD, RUBIN & LESSER,

Petitioners,

against

HORACE G. PENDER,

Trustee in Bankruptcy.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF ON BEHALF OF PETITIONERS

DAVID J. COLTON,
Attorney for Petitioners.

SAMUEL RUBIN,
of Counsel.

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Supreme Court of the United States

CONRAD, RUBIN & LESSER, *Petitioners,* against HORACE G. PENDER, *Trustee in Bankruptcy.*	October Term, 1932 No. 718

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF ON BEHALF OF PETITIONERS

Opinions Delivered in Courts Below:

CAFFEY, *D. J.* (United States District Court, Southern District of New York) reported in 52 Fed. (2nd) 755.

SWAN, *C. J.* (Circuit Court of Appeals, Second Circuit) reported in 61 Fed. (2nd) 771.

Statement as to Jurisdiction.

This matter comes before this Court on a writ of certiorari to the Circuit Court of Appeals, Second Circuit, on a petition therefor filed on February 21st, 1933, and granted on March 27th, 1933. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, the decree to be reviewed being, under the Act of September 6, 1916, a final determination under the Bankruptcy Act, subject to review by certiorari. The decree of the Circuit Court of Appeals was filed on November 21, 1932.

Statement of the Case.

This proceeding involves the construction of Section 60 (d) of the Bankruptcy Act which reads as follows:

> "If the debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney and counselor at law, solicitor in equity, or proctor in admiralty for services to be rendered, the transaction shall be re-examined by the court on petition of the trustee or any creditor and shall only be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate."

The question presented, briefly stated, is: Has the Court jurisdiction to examine a fee paid to an attorney for a corporation, for services rendered in endeavoring to bring about a reorganization of the corporation and an adjustment with its creditors, where the corporation, not being insolvent, is nevertheless unable to meet its maturing obligations in cash, and an involuntary petition in bankruptcy is subsequently filed against it.

The Facts.

Petitioners are attorneys at law engaged in the practice of law in the City of New York (Record, p. 3). The respondent is trustee in bankruptcy of David Bell Scarves, Inc., a New York corporation (Record, p. 3).

On October 31st, 1930, William W. Conrad, one of the petitioners, was consulted by David Bell, an officer of the corporation, with respect to its financial condition (Record, p. 8). Mr. Bell brought with him the balance sheet of the corporation as of the last day of the preceding month, a copy of which is found in the record at page 11.

The balance sheet showed that the corporation had net assets of approximately $65,000.00, of which about $6,000.00 was cash, $19,000.00 accounts receivable, $24,000.00 merchandise, and $15,000.00 in machinery and fixtures, after deduction for depreciation. Its liabilities comprised about $45,000.00 in accounts payable, slightly less than $5,000.00 in notes payable and about $3,000.00 in miscellaneous obligations, bringing the total liabilities to approximately $53,000.00. (We have, for the sake of convenience, used round figures instead of the precise figures set forth in the Record [p. 11].) The balance sheet further showed that there had been an operating loss of some $24,000.00 during the preceding six months period which had wiped out the previously existing surplus and had substantially impaired the capital. *The accuracy of this balance sheet has never been questioned.* It clearly indicates a *solvent,* although *unliquid,* condition. The inability to meet the corporation's maturing obligations was obviously because of the fact that a substantial part of its assets were not readily convertible into cash.

Under these circumstances petitioners were retained by the corporation to conduct such negotiations as might be necessary with its creditors and trade associations to arrange for an extension of time and, if necessary, for the operation of the business under the supervision of its creditors to the end that the business might be continued without the necessity of forced liquidation and might ultimately be restored to a sound basis (Record, p. 8). This the petitioners undertook to do for a fee of $2,500.00 which was paid to them on November 3rd, 1930 (Record, p. 9).

During the period between October 31st, 1930, and November 17th, 1930, Mr. Conrad, one of the petitioners' firm, was in practically continuous conferences with creditors and trade associations, some of which lasted until late hours of the evening (Record, p. 27). As a result of these negotia-

tions a creditors' committee was formed (Record, p. 32). The committee was, from the inception, fully informed of the fees paid to petitioners (Record, p. 33) and of petitioners' plans with respect to the reorganization of the corporation (Record, p. 29).

Although it was then contemplated that the business be continued under the supervision of the creditors' committee, or a representative of the New York Credit Adjustment Bureau (Record, p. 9), it developed in the course of the negotiations that the committee would recommend a cash settlement of 50% (Record, p. 33), rather than a protracted extension, and petitioners thereupon proceeded to procure funds for the purpose of effectuating such settlement by hypothecating the corporation's accounts receivable (Record, p. 29).

After the foregoing arrangements had been worked out, and on November 17, 1930, three creditors saw fit to file an involuntary petition in bankruptcy against the corporation and on the same day, a receiver was appointed (Record, p. 5). The receiver immediately qualified and took possession of the corporation's assets (Record, p. 5) and proceeded immediately to liquidate them by sale in bankruptcy. An order of adjudication in bankruptcy was entered on November 21, 1930 (Record, p. 4).

The receiver's report indicates that the net amount realized upon the assets sold by the receiver was $19,475.35 (Record, p. 35). That figure, of course, represents the proceeds of a forced sale of merchandise, machinery and fixtures and cannot reflect their true value as part of the assets of a going concern.

The services rendered by petitioners being aimed at the rehabilitation of the business and not its liquidation, either in bankruptcy or otherwise, such value as they may have had was destroyed by the filing of the petition in bankruptcy. The act of a small group of creditors compelled the forced

liquidation of the corporation's business under circumstances which would enable only a small fraction of its value to be realized to the detriment both of the corporation and of its creditors. In the bankruptcy proceedings a dividend of 16⅔% was declared on March 12, 1931 (Record, p. 24) with the likelihood, after deduction of administration expenses, of a small additional dividend.

Upon the appointment of a trustee in bankruptcy, proceedings were commenced against petitioners under Section 60 (d) of the Bankruptcy Act to re-examine the payment of the fee received by petitioners in connection with the efforts to bring about a reorganization of the corporation.

Upon a hearing before the referee, objection was made by petitioners to the Court's jurisdiction upon the grounds (a) that the payment to petitioners was not made in contemplation of the filing of a petition in bankruptcy by or against the corporation; and (b) that the services which petitioners were engaged to render were not those which came within the purview of Section 60 (d) of the Bankruptcy Act (Record, p. 8). The referee overruled the objections to his jurisdiction and directed the taking of testimony as to the value of petitioners' services (Record, p. 12). The petitioners, however, stood upon their jurisdictional objection and declined to submit testimony as to the value of their services (Record, p. 16). Petitioners consistently maintained that the nature of the services rendered by them, not being within the purview of the Bankruptcy Act and not being aimed toward the performance of the duties of a bankrupt, were not such as entitled petitioners to allowance out of the bankrupt estate under either Section 60 (d) or Section 64 (b) (3) and hence were not subject to re-examination in bankruptcy under the former section.

The trustee, upon rejection of petitioners' jurisdictional objection, proceeded to present, ex parte, evidence in support of his claim. No question was raised as to the facts above

set forth, the circumstances under which petitioners were retained being established by the affidavit of Mr. Conrad and his testimony previously taken in an examination under Section 21 (a) of the Bankruptcy Act. The claim that the corporation must have contemplated the filing of a petition in bankruptcy was sought to be supported by the fact that the subsequent forced liquidation by the receiver realized less than an amount sufficient to pay the creditors in full. It was also suggested that the withdrawal of various sums of money by two of the officers of the bankrupt for back salaries and the earlier payment of fees to another attorney tended to show such contemplation of bankruptcy. The referee, however, declined to permit the testimony of the officers of the bankrupt to be used (Record, p. 18) and hence no proof appears in the record of the consideration for which the various payments referred to were made. It may well be that all of the moneys received by officers of the corporation were subsequently returned to its treasury or used for purposes entirely proper.

The referee held that the services of petitioners were worth $500.00 and directed the repayment to the trustee of $2,000.00 (Order, Record, p. 37). Upon petition to review, this order was confirmed by the District Court and an opinion written by CAFFEY, *D. J.* (Record, p. 42). Leave was given to appeal to the Circuit Court of Appeals (Record, p. 2) and a decree was made affirming the order of the District Court (Record, p. 53), the opinion of the Circuit Court of Appeals being written by SWAN, *C. J.* (Record, p. 48).

Argument.

We contend:

(1) That where services are rendered by an attorney to a client, in good faith, and payment is made therefor by the client, the fact that a petition in bank-

ruptcy is subsequently filed against the client should not, of itself, under Section 60 (d) render such payment subject to summary re-examination.

(2) That the clause in Section 60 (d) "in contemplation of the filing of a petition by or against him" must be construed to mean the contemplation of actual bankruptcy proceedings and cannot be deemed to apply to every case of financial difficulty or embarrassment.

(3) That the provisions of Section 60 (d) and Section 64 (b) (3) are correlative and are intended to protect attorneys in the payment of fees in connection with bankruptcy proceedings for services rendered which are pertinent to the aims of the Bankruptcy Act as well as to protect creditors against the payment by the bankrupt, in advance of the filing of the petition, of excessive fees for services with respect to which the Bankruptcy Court should alone have jurisdiction.

(4) That our contentions are consistent with the decisions of this Court and that the determination of the Circuit Court of Appeals is inconsistent with those decisions and with the decisions in other Circuits.

POINT I.

Where services are rendered by an attorney to a client, in good faith, and payment is made therefor by the client, the fact that a petition in bankruptcy is subsequently filed against the client should not, of itself, under Section 60 (d) render such payment subject to summary re-examination.

The only limitation upon a debtor's right to engage counsel and pay for his services is found in the words "in contemplation of the filing of a petition by or against him." No provision is made with respect to any time within which

Section 60 (d) applies nor is it provided that a presumption of such contemplation will be deemed to exist where payment is made within any fixed time prior to actual bankruptcy. Conceivably a debtor might engage an attorney in actual contemplation of an inevitable bankruptcy proceeding which might not materialize for many months. It is conceivable similarly that a debtor might continue a normal business course until the very eve of the filing of a petition in bankruptcy against him without the slightest reason to contemplate that such proceedings are imminent. We do not contend that the state of mind of the debtor must always control; for a debtor might be blind to actual facts which in a reasonable person would necessarily raise a contemplation of bankruptcy. However, the mere fact of financial embarrassment in the sense that assets of a going concern are frozen and not available for the payment of maturing obligations does not create a situation which indicates the necessity or even the likelihood of bankruptcy proceedings. If such were the case, thousands of persons who today feel the stress of economic conditions should be charged with contemplation of bankruptcy in all of their acts in the normal course of their business.

It must be apparent that Congress could not have intended to single out, as subject to summary review, payments made to attorneys in the regular course of business, even where such services related to the financial condition of the client and involved efforts to relieve a strain upon the resources of the client. The payment of an attorney is usually a matter of contract between the parties. Can it be said that Congress intended to limit the right of an attorney and client, in good faith, to make arrangements mutually satisfactory to them merely because a subsequent unanticipated bankruptcy proceeding resulted from the acts of a small group of creditors?

The Bankruptcy Act makes ample provision for the protection of the rights of creditors in the event of fraudulent or preferential payments. Attorneys are not exempt from the operation of such provisions. Should any payment be made to an attorney without adequate consideration or in fraud of creditors, or with the purpose of creating a preference, remedies are available to the trustee to the same extent as where the transactions are with persons other than attorneys. There would seem to be no logical reason for assuming that Congress intended that Section 60 (d) should apply to any case other than one which came strictly within the meaning of the words "in contemplation of the filing of a petition by or against him."

In the present case can it be said either that the corporation must necessarily have contemplated bankruptcy or that its financial condition was such that it must be presumed to have contemplated the filing of a petition in bankruptcy against it? It is difficult to reconcile the condition of the business as indicated on its balance sheet (Record, p. 11) with any contemplation of bankruptcy proceedings. The fact that against the will of the corporation a petition in bankruptcy was subsequently filed and that a liquidation of its business in the manner provided for by the Bankruptcy Act realized an amount insufficient to pay its creditors in full, certainly does not justify the conclusion that actual insolvency existed. We venture to suggest that few going concerns could survive a forced liquidation of their assets without showing a deficiency.

It will be noted from the balance sheet of the corporation that close to $40,000.00 of its assets comprised merchandise, machinery and fixtures. The services which petitioners were retained to render were constructive in their nature. The value of these assets, largely destroyed by bankruptcy proceedings, would have been preserved for the benefit of the creditors and the corporation, had the pending reorganiza-

tion been carried out in accordance with the arrangement made with the creditors' committee. Had the corporation contemplated the possibility or likelihood of the filing of a petition in bankruptcy against it, no useful purpose could have been served by engaging counsel to bring about a reorganization of the corporation and an adjustment with its creditors. Can the ill-advised act of a small group of creditors and the results which flowed therefrom alter the situation which existed at the time petitioners were retained and rendered their services? Wisdom after the event certainly cannot be applied to conditions which existed at the time of the occurrences in question.

POINT II.

The clause in Section 60 (d) "in contemplation of the filing of a petition by or against him" must be construed to mean the contemplation of actual bankruptcy proceedings and cannot be deemed to apply to every case of financial difficulty or embarrassment.

Concededly the contemplation of bankruptcy refers to the state of mind of the debtor. The learned Circuit Court of Appeals suggests, in its opinion, that the imminency of bankruptcy must have been present in the thoughts of the officers of the corporation (Record, p. 53). Such conclusion is based upon the fact that the corporation and its attorneys discussed the possibility of an equity receivership to conserve the business in the event that an extension of time or other adjustment were not made with its creditors. We respectfully point out that even recourse to an equity proceeding was not contemplated by the parties but was merely a suggestion of a means to avoid a forced liquidation of a solvent business (Record, p. 9). It was the most extreme course discussed (Record, p. 9).

This Court had occasion to construe the words "in contemplation of bankruptcy" as used in Section 2 of the Bankruptcy Act of 1841 (5 Stat. at Large 442) which made invalid certain transfers and payments made "in contemplation of bankruptcy." Mr. Justice CURTIS, in *Buckingham* v. *McLean*, 13 Wall. 151, said (p. 168):

> "It is certainly true in point of fact, that even a merchant may contemplate insolvency and the breaking up of his business and yet not contemplate bankruptcy. He may confidently believe that his personal character and the state of his affairs, and the disposition of his creditors, are such that when they shall have examined into his condition they will extend the times of payment of their debts, and enable him to resume his business. A person, not a merchant, banker, etc., and consequently not liable to be proceeded against and made a bankrupt, though insolvent, may have come to a determination that he will not petition. The contemplation of one of these states, not being in fact the contemplation of the other, to say that both were included in a term which describes only one of them, would be a departure from sound principles of interpretation."

In the present case, it is not suggested, even by the trustee, that the corporation actually contemplated that a petition in bankruptcy would be filed against it. On the contrary, all of the services rendered by petitioners and the acts of the corporation by its officers were consistent only with the belief that no bankruptcy proceedings would ensue. The Act of 1841 used the term "in contemplation of bankruptcy," a more broad and general term than the words of Section 60 (d) of the Bankruptcy Act of 1898. The latter provision clearly applies not to a contemplation of a state of bankruptcy but to the actual filing of a petition in bankruptcy and the liquidation of the business in the Bankruptcy Court.

The courts in other Circuits, have, in a number of cases, held that in order to come within the meaning of Section 60 (d), something more than "consciousness of insolvency" is necessary.

In *Tripp* v. *Mitschrich*, 211 Fed. 424 (C. C. A., 8th Circ.) it appeared that within five days prior to the filing of an involuntary petition the bankrupt had employed an attorney to collect a fire loss. Prior to adjudication the attorney had settled with the insurance companies and retained his fee on a basis of 30%, in accordance with the terms of a written retainer. The trustee brought on a petition to re-examine the fee under Section 60 (d). It was held that the referee had no jurisdiction of the proceeding. POPE, *D. J.*, said (p. 427):

> "The words 'in contemplation of bankruptcy' refer to the state of mind of the debtor, not of the attorney. This results from even a casual reading of the section. But what is meant by contemplation? We are of opinion that as here used it means more than a simple consciousness of insolvency. * * * Contemplation thus means more than the knowledge that a bankruptcy proceeding either by or against the debtor is impending. It means that in making the transfer the debtor is influenced by the possibility or imminence of such a proceeding. There must be some relation as of cause and effect between knowledge of his condition and the transfer."

It is to be noted that the Court, in the *Tripp* case, called attention to the fact that in many of the cases where referees had been permitted to review and re-examine fees paid to attorneys prior to the filing of a petition in bankruptcy, the attorneys had appeared and submitted voluntarily to the jurisdiction of the referee. Accordingly, it was pointed out, many of the cases in which fees had been re-examined were not controlling on the question of jurisdiction, since such

question had not been raised. The Court said, in the *Tripp* case, after reviewing the earlier cases (p. 431):

> "But in none of these cases was the question one of jurisdiction. The crux of the controversy in each case was not whether the fee was reviewable but whether it was allowable. In each of these instances the attorney submitted his case to the Court on the merits and these expressions were in determining how far he was entitled to the protection of Section 60d. Were Mitschrich here submitting his case and asking the Court to declare how far his fee was allowable, instead of resisting jurisdiction, the case last quoted would be instructive. But that is not the situation."

Similarly, in *In re Geller*, 216 Fed. 558 (D. C. D. N. J.), it appeared that an attorney was engaged to conduct negotiations and adjust certain claims against insurance companies. The attorney collected moneys shortly before the filing of a petition in bankruptcy and withheld his fees. Upon application by the trustee to re-examine such fees under Section 60 (d), it was held that the referee was without jurisdiction, HAIGHT, *J.*, said (p. 562):

> "The fact that it might have occurred to the bankrupt, when he made the assignment, that proceedings in bankruptcy might thereafter be instituted either by or against him, and that the attorney to whom the collection of moneys was intrusted might deduct his fees therefrom, coupled with the fact that he afterwards attempted to do so, cannot be considered as a payment in contemplation of bankruptcy, such as is within the purview of Section 60d."

This Court had occasion to construe the provisions of Section 60 (d) in the case of *In re Wood and Henderson*, 210 U. S. 246. The question involved in that case was one of the manner of acquiring jurisdiction and of the method

of re-examination. In the course of the opinion of the Court, Mr. Justice DAY said (p. 253):

> "It (Section 60d) recognizes the right of such a debtor to have the aid and advice of counsel, and, *in contemplation of bankruptcy proceedings which shall strip him of his property,* to make provision for reasonable compensation to his counsel. * * *"

(P. 258):

> "This section in effect confers a special jurisdiction in a bankruptcy proceeding; it is only available when property has been transferred in contemplation of the filing of a petition in bankruptcy. *When the affairs of one about to be adjudicated a bankrupt are in that situation,* then the Act, recognizing the right of the bankrupt to legal services to be rendered, undertakes to prevent the diminution of the estate to be administered and distributed for the benefit of creditors beyond a fair provision for counsel under such circumstances." (Italics ours.)

Mr. Justice BREWER (in a dissenting opinion upon another phase of the matter) similarly said (p. 264):

> "While Section 60d is not in the Bankruptcy Act of 1867, obviously it was specially inserted in the present act for the purpose of making clear the liability of counsel receiving payment in advance. It is simply a declaration that an excessive prepayment to counsel *employed with a view to bankruptcy proceedings* is to be considered, so far as the excess is concerned, a preference and recoverable by the trustee in bankruptcy." (Italics ours.)

Although the foregoing language has been construed as giving a broad interpretation to the provisions of Section 60 (d), it is respectfully suggested that this Court did not, in the above case, intend to suggest that the language of

Section 60 (d) should be deemed to apply to any case other than one in which the debtor employs an attorney in definite and immediate contemplation of the filing of a petition in bankruptcy by or against him.

In *In re Porter,* 253 Fed. 552 (C. C. A., 7th Circ.) the Court, in a per curiam opinion, after reviewing evidence touching upon the payment of certain fees to an attorney, said:

> "We conclude that such evidence amply supports the referee's finding that the payment was made by the bankrupt out of his estate in contemplation of bankruptcy and was for services rendered or to be rendered such bankrupt in the matter of his bankruptcy proceedings."

The Court held that upon such finding an order could properly be made under Section 60 (d). An application to this Court for a writ of certiorari was denied.

Haneey v. *Taylor,* 248 U. S. 585.

It is apparent from the foregoing decision that on the theory adopted by the Circuit Court of Appeals of the Seventh Circuit, anticipation of immediate proceedings in bankruptcy was the compelling motive for retaining and paying the attorney. Conversely, it would appear that if such were not the impelling motive, the Court would not have had jurisdiction.

POINT III.

The provisions of Section 60 (d) and Section 64 (b) (3) are correlative and are intended to protect attorneys in the payment of fees in connection with bankruptcy proceedings for services rendered which are pertinent to the aims of the Bankruptcy Act as well as to protect creditors against the payment by the bankrupt, in advance of the filing of the petition, of excessive fees for services with respect to which the bankruptcy court should alone have jurisdiction.

It was early pointed out that by reading together the provisions of Sections 60 (d) and 64 (b) (3) of the Bankruptcy Act, a logical arrangement is worked out for the compensation of attorneys who assist the bankrupt in rendering those services which are required of him by the Bankruptcy Act. Section 64 (b) (3) extends priority, as part of the cost of administration, to fees "for professional services actually rendered * * * to the bankrupt in involuntary cases while performing the duties herein prescribed."

Under the latter section, provision is made for payment to attorneys who have rendered services within the purview of the Bankruptcy Act out of the estate itself. Section 60 (d) has been construed as protecting attorneys who may have received payment in advance of the filing of a petition in bankruptcy, to the extent that such payment so made shall not be deemed preferential. In order that the Court may not be limited in its right to fix compensation, and in order to prevent a person about to become a bankrupt from arrogating to himself the right of the Court to fix compensation for such services, provision is made for a re-examination of the fees so paid.

It has accordingly been repeatedly held that the provisions of Section 60 (d) have no relation whatsoever to serv-

ices other than those "germane to the aims and purposes of the Bankruptcy Act" and that compensation paid to attorneys for other purposes are not subject to re-examination under that Section.

In an early case, *In re Kross*, 96 Fed. 816 (D. C. N. Y.), Judge BROWN said (p. 819):

> "Section 64 speaks only of an attorney's fees; while Section 60, subd. d, uses the word 'counselor' also. The services contemplated by both are doubtless for the most part those of an attorney only, as distinguished from the services of 'counsel.' They include the preparation of the necessary legal papers, procuring the adjudication and reference, bringing the debtor before the referee for such subsequent proceedings as may be required, making in due time the application for discharge, attendance before the judge and referee, as may be needful, and throughout the proceedings keeping himself informed of their progress and giving such attention to the essential steps in the bankrupt's behalf as will secure to him a regular and valid discharge. These are the ordinary attorney's duties."

Construing the provisions of Section 64 (b), the Court said (p. 818):

> "This clause of paragraph 3, therefore, indicates the general nature of the services for which a fee is designated to be allowed, viz: those professional services which presumably are necessary and indispensable to the bankrupt to enable him to perform the duties required of him by the act for the benefit of creditors on the one hand, or to secure his own correlative right to discharge on the other."

Again referring to Sections 60 (d) and 64 (b) he said (p. 818):

> "The charges to be 'approved' are, I cannot doubt, for the same services which the 'fee' is designed to be

> allowed for under Section 64, subd. b, par. 3. Both paragraphs are to be construed, together, so that it becomes immaterial in the result whether the attorney obtains his compensation in the first instance from the bankrupt under Section 60, refunding what, if anything, is disallowed by the court, or whether he waits for an allowance by the court under Section 64."

The theory of the *Kross* case, which limits the application of Section 60 (d) to those cases in which services rendered were pertinent to the purposes of the Bankruptcy Act, has been repeatedly applied in other cases in various Circuits. In *In re Stolp,* 199 Fed. 488 (D. C. E. D. Wisc.), the Court reviewed the authorities and came to a conclusion similar to that of Judge BROWN. The Court said (p. 495):

> "The general conclusions are that Section 60 refers to the services to be rendered after the time of the payment or transfer; *that such services must be germane to the general aims of the Bankruptcy Act;* that they must be actually rendered, if at all, before the institution of bankruptcy proceedings, and that the payment or transfer specified in said section cannot apply to services rendered as specified in Section 64b; that Section 64b refers to services rendered after the bankruptcy proceedings are instituted, to aid the bankrupt in performing his duties under the act."

Commenting on the case of *In re Habegger,* 139 Fed. 623 (C. C. A., 8th Circ.), the Court said, in the *Stolp* case:

> "The question as to the character of the services contemplated was directly involved in *In re Habegger* (C. C. A., 8th Circ.), 15 A. B. R. 198, 139 Fed. 623, and it was determined that they were such as were to be rendered in aid of the purpose sought to be accomplished by the Bankruptcy Act, to conserve and benefit the estate of the bankrupt, and therefore inure to the benefit of creditors; and accordingly a payment or

> transfer from a failing debtor for services to be rendered in endeavoring to get a composition with creditors, and in defending the failing debtor in a criminal prosecution, was not within the terms of this section."

The Court adopted the rule in the *Habegger* case and said:

> "I am aware that this restricted view will also affect the application of the remedy provided in Section 60d strictly to such cases as appear to be payments for services to be rendered, when such services are admitted or adjudicated to be of the character specified, namely, services germane to the purposes of the Bankruptcy Act; and when it appears that the service to be rendered was not of such a character, the right to review cannot be exercised, but the transaction must either stand or be attacked under some other provision of the Bankruptcy Act."

Similarly in *Quinn* v. *Union National Bank,* 32 Fed. (2nd) 762 (C. C. A., 8th Circ.), KENYON, *C. J.,* said (p. 765):

> "It is the purpose of Section 60d of the Bankruptcy Act to permit a party to secure the services of attorneys to be rendered in connection with the bankruptcy proceedings, and said subdivision d relates to services germane to the bankruptcy proceedings * * * The test laid down by Judge Adams in *Re Rosenthal and Lehman* (D. C.), 120 F. 848, is whether or not the services are rendered in good faith for the purpose of administering the act in a way to carry out the purpose of its enactment."

The Circuit Court of Appeals in the Second Circuit, in an earlier case, had come to a similar conclusion with respect to the scope of Section 60 (d). In *In re Rolnick,* 294 Fed. 817, the Court said (p. 819):

> "The act recognizes the right of the debtor to have the aid and advice of counsel, and to make provisions

> for a reasonable compensation to his counsel for *services which are germane to the aims of the Bankruptcy Act,* subject, however, to the right of the Court, if the Trustee or any creditor questions the transaction, to re-examine it, with a view to determining the reasonableness of the amount paid. *In re Wood*, 210 U. S. 246. *But the services to be rendered, we think, must be germane to the aims of the Bankruptcy Act and they must be rendered prior to the institution of the bankruptcy proceedings to make Section 60d applicable."* (Italics ours.)

In the present case the learned Circuit Court of Appeals apparently held that the fees paid to an attorney are subject to re-examination regardless of the nature of the services which the attorney was engaged to perform.

It was our contention to the learned Circuit Court of Appeals that if, properly construed, Section 60 (d) does not permit allowance for services not germane to the purposes of the Bankruptcy Act, it must be similarly held that payments made to attorneys for services of a different nature are not subject to re-examination. The learned Court held that such contention is a *non sequitur.* The Court, in its opinion, stated (Record, p. 52):

> "The premise is that, as to services in no way beneficial to the estate or connected with the duties of a bankrupt, no compensation is allowable. The conclusion need not be, as the appellants urge, that none of the retainer is recoverable by the trustee under section 60d; rather it may be that the whole of it is recoverable, as *In re Habegger* seems actually to have held."

The effect of the Court's determination must accordingly be that all fees paid, for whatever services rendered, where bankruptcy is contemplated by the client, are subject to re-examination, even though not subject to any allowance

whatsoever. Such construction, we respectfully urged, could not have been contemplated by Congress. Thus, valuable services might be rendered by an attorney in good faith wholly apart from proceedings in bankruptcy and yet moneys paid to such attorney, however reasonable in amount, would, under the theory of the learned Circuit Court of Appeals, be subject to summary review and refund in the event that bankruptcy subsequently occurred.

POINT IV.

Our contentions are consistent with the decisions of this Court and the determination of the Circuit Court of Appeals is inconsistent with those decisions and with the decisions in other circuits.

In *Randolph* v. *Scruggs,* 190 U. S. 533, Mr. Justice HOLMES, in discussing the extent to which an attorney was entitled to priority of payment out of a bankrupt estate for services rendered to the bankrupt and to his assignee for the benefit of creditors, said:

> "We are not prepared to go further than to allow compensation for services which are beneficial to the estate."

In *In re Wood and Henderson,* 210 U. S. 246 (quoted *supra*) this Court again held in construing Section 60 (d) that it provided for the payment of a fair compensation to an attorney engaged by the bankrupt in contemplation of the filing of a petition in bankruptcy.

So far as we are able to ascertain, this Court has not passed upon the question whether the proper construction of Section 60 (d) with respect to jurisdiction to re-examine limits such jurisdiction to cases as involve services which, under the *Randolph* case, are subject to compensation. To

hold, as the learned Court below did, that while not subject to compensation, services not directly beneficial to the estate are, nevertheless subject to re-examination, would create a situation involving an extremely inequitable state of affairs. If the Court's jurisdiction to re-examine is broader than the Court's authority to make allowances for services rendered, an attorney would be deprived of even fair compensation for services rendered in good faith in connection with matters not pertinent to the bankruptcy proceedings.

Under the rule in the *Randolph* case, the Bankruptcy Court cannot extend priority or allow compensation to an attorney except for services which are beneficial to the estate and only to the extent of the benefit derived by the estate. Thus a standard is prescribed by which the value of an attorney's services is to be measured in a court of bankruptcy. If, as a number of cases hold, Section 60 (d) is to be construed as supplementing Section 64 (b) (3), and as so construed is to be limited in its application to services "germane to the purposes of the Bankruptcy Act," a logical method for the payment of attorneys' services in connection with bankruptcy proceedings is created. If, however, the decision of the Circuit Court of Appeals is correct, all services rendered are subject to re-examination and then, applying the yard-stick prescribed by this Court, allowance is to be made only to the extent that such services are beneficial to the estate. In many cases, as the Court below suggests, no compensation whatsoever could be allowed.

Our present contention is that under Section 60 (d) payments made for legal services to conserve the estate or to aid the bankrupt in performing the duties devolving upon him under the Bankruptcy Act, and the like, are subject to re-examination; that in such case the true measure of value is that applied in the *Randolph* and *Wood* cases, *supra*, i. e., the benefits derived either in assisting in the administration of the estate or in conserving its assets; that to such extent

payments made, even in the knowledge of the client's condition, are protected against attack as preferences; that all other payments for services rendered are neither protected from such attack nor subject to summary review; that in such other cases, if the payment is made without adequate consideration or is received after the rendition of the services with knowledge of its preferential character, such payment is subject to attack only in an action to set aside a fraudulent payment or transfer.

Such construction is consistent with the general principles of the Bankruptcy Act. It avoids the singling out of attorneys as being subject to such discriminatory provisions. Certainly a doctor, dentist or accountant who may have received substantial fees on the very eve of bankruptcy is not subject to summary process under Section 60 (d). The construction for which we contend avoids the manifestly unfair and unjust rule under which the yard-stick by which the value of the services is determined is the benefit to the estate.

Concededly, the services rendered by petitioners, however valuable they might have been to the client, were of little value to the bankrupt estate. As a matter of fact the filing of the petition in bankruptcy destroyed the value which petitioners' work had built up. To say that the value of such services must be measured according to the rule indicated in the opinion of the Court below is, in effect, to deprive petitioners of any fair compensation for services rendered, in good faith, in a lawful, proper and wholly laudable effort of the client to reorganize its business and keep it a going concern.

Logic and reason militate against the construction adopted by the Court below.

Freedom of contract applies to attorneys' services as to all others, in the absence of express statutory prohibition. Neither the client nor the attorney in this case could foresee future events. According to the books of the corporation

it was solvent even though unable to liquify its frozen assets to avoid embarrassment. It is not questioned that petitioners were retained by the corporation in the honest belief that the services rendered by them would be of substantial benefit to the corporation and that the appellants did, in good faith, render substantial services which, had a petition in bankruptcy not been filed, would have been instrumental in saving the corporation's business and also in conserving the creditors' rights. A summary re-examination of the payment made for such services is, we submit, inequitable and without legal justification. This is especially true where the measure of compensation to be applied is wholly different from that which would ordinarily prevail between attorney and client.

Our contentions, if sound, do not foreclose the trustee from proper proceedings in which the good faith of petitioners may be questioned. If there is even a suggestion that petitioners acted other than in good faith the trustee may, by proper proceedings, attack the payment and secure proper remedy.

V.

The decree appealed from should be reversed and the proceedings remitted to the Court below with appropriate directions to dismiss the petition of the trustee.

Respectfully submitted,

DAVID J. COLTON,
Attorney for Petitioners.

SAMUEL RUBIN,
of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1932.

No. 718.

CONRAD, RUBIN & LESSER,

Petitioners,

—against—

HORACE G. PENDER, as Trustee in Bankruptcy of the Estate of David Bell Scarves, Inc., Bankrupt,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

GEORGE C. LEVIN,
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GEORGE J. HIRSCH,
Of Counsel.

THE COURT PRESS, INC.

Supreme Court of the United States

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Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Statement.

This application arises out of a summary proceeding instituted pursuant to §60-d of the bankruptcy act (11 U. S. C. A. 96, d), by a trustee to re-examine a $2,500 attorneys' fee paid to petitioners whose objection to the jurisdiction of the bankruptcy court has been successively overruled by the referee, the district and circuit courts.

The issue turns on whether the payment made *twelve days* before the petition was "made in contemplation of bankruptcy". The power of the referee to act summarily in a proper case is not disputed. Jurisdiction is here challenged on the circumstances involved on the ground that payment to an attorney "to effectuate a reorganization of the corporation and a settlement with its creditors" (Peti-

tioners' Brief, pp. 2, 13) is not subject to re-examination, and this even though the retention did contemplate "continuance of the business under the supervision of an Equity Receiver, * * * a committee of creditors or a representative of the New York Credit Men's Adjustment Bureau, Inc." (p. 16, fol. 47).

The decision therefore hinges upon questions of fact which are carefully reviewed in the opinions by Circuit Judge Swan (pp. 78-83)* and District Judge Caffey (pp. 67-70).†

In view of the ruling in this Court in *Wood* v. *Henderson*, 210 U. S. 246 (1908), construing §60-d, the question has been authoritatively passed upon and requires no further consideration. Mr. Justice Day discussing the section held (210 U. S. 253):

> "It (the statute) recognizes the temptation of a failing debtor to deal too liberally with his property in employing counsel to protect him in view of *financial reverses and probable failure.* It recognizes the right of such a debtor to have the aid and advice of counsel, and, in contemplation of bankruptcy proceedings which shall strip him of his property, to make provisions for reasonable compensation to his counsel. And, in view of the circumstances, the act makes provision that the bankruptcy court administering the estate may, if the trustee or any creditor question the transaction, re-examine it with a view to a determination of its reasonableness." (Italics ours.)

Unnecessary emphasis is placed by petitioners upon the existence of some diversity of opinion on the *general* subject of attorneys' fees and their *allowance* in bankruptcy.

* Reported at 52 F. (2d) 755.

† Reported at 61 F. (2d) 771.

The cases urged bear solely on the distinction between sections 60-d and 64(b)3 (11 U. S. C. A. 104(b)3), the latter relating only to legal services rendered *subsequent* to the filing of the petition in bankruptcy, of which class of services there are none present in this case. Petitioners rendered no services after bankruptcy (Brief, p. 3), hence section 64-b(3), and cases construing that subdivision, have no application.

Wherefore, it is respectfully submitted that petitioners have shown no reason in law or in fact which would justify this court in granting a writ of certiorari.

Respectfully submitted,

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THE COURT PRESS, INC.

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CONRAD, RUBIN & LESSER,

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—against—

HORACE G. PENDER, as Trustee in Bankruptcy of the Estate of David Bell Scarves, Inc., Bankrupt,

Respondent.

RESPONDENT'S BRIEF.

Statement.

This case is presented on writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a decree which affirmed an order of the District Court for the Southern District of New York, dismissing a petition to review an order entered by the Referee in Bankruptcy in a proceeding instituted by the Trustee under § 60-d of the bankruptcy act (11 U. S. C. A. 96, d), to re-examine the reasonableness of an attorney's fee amounting to $2,500 paid to the petitioners by the bankrupt. The Referee held that the sum of $2,500 was unreasonable for the services rendered and fixed the fee in the sum of $500 and directed the return to the estate of $2,000. For the opinions below, see 52 F. (2d) 755 and 61 F. (2d) 771.

The Issue.

Petitioners raised as the sole ground of review the claim that the Referee had no jurisdiction to enter the order

herein appealed from on the ground that the payment was not made "in contemplation of bankruptcy" (fol. 71).

Petitioners insist that their retainer was to avoid bankruptcy by effecting a 50 per cent. settlement with creditors, and contemplated only an extension under creditors' control, or an equity receivership.

The Proceedings.

The original papers upon which this proceeding was instituted contained two counts, one based on § 60-d and the other on § 67-e (11 U. S. C. A. 107-e), of the bankruptcy act (fols. 6-11). The petitioners having entered objection to the power of the court to entertain the application, the Trustee on the return date withdrew the second count, which is based upon § 67-e, relating to fraudulent transfers, the Trustee conceding that with respect to the latter count, the court had no jurisdiction unless conferred by the consent of petitioners (fol. 22).

On the return day petitioners filed a cross notice moving in the alternative to dismiss the Trustee's petition on the ground that the petition "fails to state facts sufficient to constitute a claim within the jurisdiction of the said Referee and that the same is insufficient in law upon its face or in the alternative for an order striking out as irrelevant and improper" certain designated paragraphs (fol. 12).

The Referee reserved decision on this application and in order to ascertain the merits of petitioners' contention, requested the filing of a petition or affidavit outlining the services rendered (fol. 23) in order that the Court might make a preliminary finding on the question of jurisdiction, pursuant to practice indicated by the circuit court in *Re Falk*, 30 F. (2d) 607, (C. C. A. 2).

Petitioners thereupon filed the affidavit of a member

of their firm, William W. Conrad (pp. 7-10) and thereafter the Referee handed down the following decision (fol. 19):

> "The undersigned Referee, after a careful consideration of the allegations, is of the opinion that the objection to the jurisdiction of the Referee is not well taken and should be overruled.
>
> A further date may be obtained from the Referee's office for the purpose of taking testimony."

A further date was fixed by the Referee pursuant to the express request of petitioners contained in Mr. Conrad's affidavit, which concludes with this statement (fol. 17):

> "This affidavit is filed with the express reservation of the right to a hearing as to the services rendered and a reasonable compensation to which deponent's firm is entitled by reason thereof, in the event that it ultimately be determined that the payment therefor comes within the purview of §60-d of the Bankruptcy Act."

Pursuant to the Referee's holding on the date thereafter set, the Trustee made proof of the allegations set forth in the petition with respect to the first count (pp. 14 *et seq.*). Petitioners on the return day asked that the entire matter be put over and that an intermediate order be entered at that stage of the proceedings in order that the objection to the jurisdiction might be tested out on appeal (fol. 24). To this proposal, the Trustee entered objection, maintaining that regular procedure required that petitioners give proof as to their services, without requiring the Trustee to try out every issue piece-meal.

The Court's attention was further directed to petitioners' request for a hearing as to their services (fol. 24):

> "I ask your Honor to direct the respondents (pe-

> titioners in this Court) pursuant to their own request set forth in their affidavit filed in this proceeding * * * to appear and give such proof as they desire with respect to the services they have rendered in order that your Honor can determine the reasonableness of the fee paid to them."

Petitioners contended that to give proof as to their services would be tantamount to a waiver of their jurisdictional objection (fols. 24-26), even though the Trustee proposed that petitioners give any proof desired with the understanding and concession that any such offer would be without prejudice to their subsequent right to oppose on jurisdictional grounds (fols. 26, 30). The Referee refused to sign an interlocutory order on the authority of *Childs* v. *Ultramares Corporation*, 40 F. (2d) 474 (C. C. A. 2), in which the Court held that such an order was not appealable. The Referee overruled the objection of petitioners who remained in the courtroom during the presentation of the Trustee's case (fols. 23-30).

It is submitted that a party making timely objection on the question of jurisdiction, does not waive his objection by giving proof under Court compulsion. (See *Louisville Trust Co.* v. *Comingor*, 184 U. S. 18; *Weidhorn* v. *Levy*, 253 U. S. 268).

The Referee held the payment unreasonable and fixed the allowance at $500. This disposition the district and circuit courts affirmed.

The Facts.

Despite some slight intimation in petitioners' brief (p. 6) to the contrary, there can be no dispute as to the facts giving rise to the application here involved. The pertinent allegations are set forth in the Trustee's petition (pp. 3-6). By filing a notice of motion to dismiss the

Trustee's petition on the ground that "each count thereof fails to state facts sufficient to constitute a claim within the jurisdiction of the said Referee and that same is insufficient in law upon its face" (fol. 12), petitioners were, as a matter of law, filing a demurrer and thereby conceding the existence of every fact alleged by the Trustee.

The only purpose of the Trustee in going forward and giving proof was to establish for the Court the nature of the services rendered by petitioners in view of their refusal to present proof in line with their previous request.

The facts involved are carefully summarized in his opinion by Circuit Judge Swan, 61 F. (2d) 771 at 772; Record, page 49, as follows:

> "The corporation was in financial difficulties and unable to meet its maturing obligations. Prior to retaining the appellants, it had engaged another attorney, Mr. Pratt, to negotiate a settlement with its creditors, and a meeting with some of its creditors had been held. Apparently the appellants were retained to supplement the efforts of Mr. Pratt, to whom $750 had already been paid upon a promised fee of $2,000. Mr. Conrad's testimony given at an examination under section 21 (a), (11 U. S. C. A. 44, a) was to the effect that he was to negotiate with creditors for a 50 per cent. cash settlement and was to assist the corporation in hypothecating its accounts receivable in order to obtain the necessary money to carry out such a settlement. His affidavit submitted in opposition to the referee's jurisdiction states that the most extreme course which was within the contemplation of himself and Mr. David Bell, the Bankrupt's president, was continuance of the business under an equity receivership, although that course was not contemplated if the business could be continued under the supervision of a committee of creditors, or a representative of the New

York Creditors Adjustment Bureau, Inc. It also appears that within two weeks prior to November 5th, when the appellants' retainer was paid, David Bell had withdrawn $1500 from the corporation, and his brother, who was an employee, had withdrawn $750. The cash resources of the corporation were so low that the appellants' retainer could not be paid until a sale of merchandise was made; the purchaser's $2500 check was then endorsed to the appellants. Upon these facts the district court concluded that the thought of bankruptcy was the impelling motive of the debtor corporation when its president retained the appellants. Hence the payment was held subject to summary re-examination."

For a detailed statement of the services rendered the Court's attention is invited to the examination (pp. 7-10) under § 21-a of Mr. Conrad, from which it appears that in accepting his own version of what was accomplished, the services rendered consisted solely of a number of conferences, not a single scrap of paper being prepared by him nor his firm, nor a docket entry being made in connection with the case (fols. 41-44). Served with a *subpoena duces tecum*, he had not even a file to produce at the examination and was compelled to admit that there were no papers in his office relating to the case (fol. 41). Subsequent to the examination, as part of his affidavit upon the institution of these proceedings, he did produce an alleged balance sheet of the bankrupt to indicate solvency of the company, a document which he did not produce at the § 21-a examination.

It appeared that on October 29, 1930 the bankrupt called a meeting of its creditors to discuss its financial difficulties (fol. 7).

POINT I.

The facts alleged in the Trustee's petition all of which are admitted by petitioners' motion to dismiss, clearly establish a claim within the purview of §60-d of the National Bankruptcy Act.

In line with the approval indicated by this Court in *Wood* v. *Henderson*, 210 U. S. 246, the Trustee in instituting this proceeding, adopted the practice suggested by text-writers on bankruptcy, which this Court indicated is "entitled to much respect" (210 U. S. 257).

A discussion of the section here involved may be found in Collier on Bankruptcy, 13th Edition 1923, Volume 2, pages 1334-39 and Remington Bankruptcy, 3d Ed. §2726.

In view of petitioners' motion to dismiss, the Referee had but to read the Trustee's petition and determine if the facts set forth established a case within the section. Having made a finding to that effect, petitioners were under duty to give proof as to the value of their services, either by oral testimony or filing an affidavit. Here the petitioners made special request for "a hearing as to the services rendered" (fol. 17). Upon their refusal to give such proof, the Trustee submitted to the Court as admissions against interest the affidavit of Mr. Conrad (pp. 7-10) and his examination under §21-a of the bankruptcy act.

With all of the facts before him, the Referee properly fixed the value of petitioners' services concerning which petitioners at no time in these proceedings, have raised any question.

POINT II.

A person is very much in contemplation of the thing he wishes to avoid.

The essence of petitioners' position amounts to the claim that their client at no time desired bankruptcy, the

hope being that a 50% settlement or extension might be consummated with creditors.

According to the affidavit of Mr. Conrad, the matters discussed at the time of his retention were as follows (fol. 16):

> "The services to be rendered by your deponent consisted in doing things which would of themselves negative the possibility of a liquidation in bankruptcy. The most extreme course which was within the contemplation of your deponent and of Mr. Bell was the continuance of the business under the supervision of an equity receiver, even though that course was not contemplated if the business could be continued under the supervision of a Committee of Creditors or a representative of the New York Credit Men's Adjustment Bureau, Inc."

Mr. Conrad's testimony established that he was offering a 50% settlement to creditors (fols. 48-50).

In the matter of his retainer, Mr. Conrad further testified (p. 28, fol. 43):

> "Q. When was the matter of compensation arranged? A. At the first meeting I had in this matter.
>
> Q. And what was the conversation in that connection? A. Mr. Belsky asked how much I would charge and I told him my usual fee in these matters is $5,000; that I was not interested in any proceeding between a debtor and his creditors for a lesser amount. He thereupon asked me if I would do something better."

It further appears that there was some difficulty in prospect for his client with respect to an alleged false financial statement that had been issued (p. 30, fol. 46).

> "Q. Well, what was the difficulty in connection

with the financial statement? A. Well, the usual trouble that you find in this kind of cases, where creditors claim statements to be false, and, of course, getting around it in a manner that you placate these creditors, in order that they may be in a position to accept, or even consider a settlement."

In connection with his retainer, Mr. Conrad significantly testified as follows (p. 30, fol. 46):

> "Q. Was there any talk as to how this $2,500 was to be paid, and when? A. Cash; to be paid in cash. They told me they would have a check at my office either the next day or the following Monday; and they did.
>
> Q. I assume that you refused to act until you got that payment? A. That is right."

Petitioners' insistance upon cash in a case where a settlement was proposed, in a situation where an equity receivership or an assignment for the benefit of creditors was under consideration, should lead any reasonable person to the conclusion that bankruptcy was contemplated but not desired.

Judge Swan's comment in that connection is an apt one (61 F. (2d) 773):

> "That the retainer in the case at bar was paid in contemplation of bankruptcy seems too clear to admit of controversy. When the client and attorney are considering an equity receivership in case the creditors will not accept an offered settlement, it is inconceivable that the imminence of bankruptcy and the avoidance of it is not present in their thoughts."

At page 772, the same Court observed:

> "When a debtor is in such straits that he knows

> he is likely to end in the bankruptcy court and he engages an attorney to take steps to prevent it, a payment in advance for services of that character would seem clearly to fall within the literal terms of that statute; the payment is made 'in contemplation of bankruptcy' no less when made to fend against it than when made to bring it about."

Judge Caffey, in this case, writing in the District Court made an equally cogent comment (52 F. (2d) 755, at 756):

> "Upon the present record, the referee was fully warranted in concluding, and I think from the circumstances that the inference is inescapable (*cf. Quinn* v. *Union Nat. Bank* (C. C. A.), 32 F. (2d) 762, 767, 768), that, when the debtor engaged the respondents, he contemplated bankruptcy. Accepting the testimony of one of the respondents, it appears incontrovertibly that the employment was exclusively for the formulation of arrangements that would have adjusted affairs of the debtor in some fashion with all of his creditors and would have affected, for the benefit of the estate, all the assets of the debtor. As it seems to me, it is wholly consistent with the language of section 60d to construe the jurisdiction there conferred to embrace authority summarily to fix the reasonable value of fees for services in such matters, including attempted adjustments designed to avoid bankruptcy, and that it would render some of the language surplusage or meaningless to construe the jurisdiction as excluding this subject.
>
> There must be plain and strong ground for depriving language of a statute of full operation before the court is justified in confining it to a field more restricted than that comprehended within the literal words. Nullification of the words in the statute by implication, such as is sought by the argument that the two sections discussed are completely correlative, is not favored in the law. I have been unable to find

> any warrant for limiting the natural application of the phraseology in section 60d so as to remove from it services of the character that were performed by the respondents."

The decisions in this case have been favorably commented on in an article in the Yale Law Journal (January, 1933), and after a full and complete discussion of the authorities, the editor observes, 42 Yale Law Journal 434, 435:

> "The result reached in the principal case would seem reasonable. Certainly a debtor acts very much in contemplation of a result which he employs counsel to avoid."

The conclusion is supported by a number of authorities below cited:

> *In re Klein-Moffet Co.* (D. C. Md. 1928), 27 F. (2d) 444, 445, per Coleman, *J.*:
>
> "Although (the attorney's services) rendered over a period of extreme financial difficulty *in an effort to** *keep the business out of bankruptcy, the services were nevertheless in contemplation of bankruptcy.*" (Citing *Furth* v. *Stahl, infra.*)

In the opinion at page 445 the Court summarizes the services rendered by the attorneys in the *Klein-Moffet* case as follows:

> "The general nature of the services, insofar as is here material, was that they were rendered in an effort *to adjust the financial difficulties of the company.*"

The Court then proceeds to detail some of the services performed for which payment was made and points out among other things that

> "counsel was engaged in an endeavor *to rehabilitate*

* Unless otherwise indicated italics throughout this brief are the writer's.

> *the corporation* * * *. His work involved numerous conferences with stockholders and creditors, and, in general, *such labor as is usually incidental to efforts to reorganize* AND AVOID BANKRUPTCY."

Quinn v. *Union National Bank*, 32 F. (2d) 762 (C. C. A. 8), Kenyon, *C. J.*, discussing a definition of "in contemplation of bankruptcy" at pages 766 and 767, concludes 768:

> "To say that his action under all these circumstances was not in contemplation of bankruptcy is to say that he did not intend the natural consequences of his action, and that his mental contemplations were different from those of the average and general run of mankind. There was more than a mere possibility of bankruptcy proceedings arising on Ewert's financial condition."

In re Lang, 20 F. (2d) 239, (D. C. E. D. Pa. 1927), Kirkpatrick, *D. J.*, at page 240, held:

> "There will almost always be a period in the history of any insolvent during which he realizes his difficulties and faces the possibility, or even probability, of ultimate bankruptcy. At such a time, he will (p. 241) require the services and advice of counsel, *frequently with the hope of avoiding bankruptcy proceedings altogether.*"

In *Furth* v. *Stahl*, 205 Pa. St. 439, 443, 55 Atl. 29, 30 (1903), the Supreme Court of Pennsylvania said:

> "The services of the plaintiff belong to this class. They were none the less rendered in contemplation of the filing of a petition in bankruptcy, because directed primarily and principally *to the prevention of such petition. A man is usually very much in contemplation of a result which he employs counsel to avoid.*"

Furth v. *Stahl* was cited with approval by this Court on other grounds in *Wood* v. *Henderson* cited *supra*. For other instances in which Courts have recognized that attempts by attorneys to unravel complicated financial affairs, constituted cases within the terms of the statute, see *In re Cummins* (D. C. S. D. N. Y. 1912), 196 Fed. 224; *Slattery* v. *Dillon*, 17 F. (2d) 347, (C. C. A. 9, 1926).

Slattery v. *Dillon* emphasizes that the making of an assignment for the benefit of creditors is good evidence of the probability that bankruptcy might ultimately follow.

Mr. Conrad's affidavit specifically states that it was the desire of the parties that "the business * * * be continued under the supervision of a committee of creditors or a representative of the New York Credit Men's Adjustment Bureau" (fol. 16, p. 9). This arrangement is tantamount to an assignment if not a surrender of the bankrupt's property for the benefit of creditors.

POINT III.

The Bankruptcy Court has the power to fix summarily the value of services of an attorney retained by the debtor two weeks before the bankruptcy petition to negotiate for a settlement with creditors.

This Court has indicated the purpose of the section in question. Quoting with approval in *Wood* v. *Henderson*, cited *supra*, from the decision of Judge Severens in the case of *Pratt* v. *Bothe*, 65 C. C. A. 48, 130 Fed. 670, Mr. Justice Day, writing for the Court, observed:

> "It would rather seem that Congress, engaged, as many signs indicate, in guarding the assets of those in contemplation of bankruptcy, to the end that they might be brought, without unnecessary expenditure, to the hands of the trustee for distribution to creditors, while it would not deny to the debtor the right

> to employ and pay for legal assistance in his affairs *during that critical period*, yet proposed a restraint upon that privilege by requiring that such payment should be reasonable in amount,—in short, proposed to apply *to the incipient* stage of bankruptcy the provident economy which it sought to apply to the administration of the bankrupt's estate. It may have been thought that there was the same reason for such restraint at that stage of affairs as subsequently. And it is to be observed that the transaction would not become the subject of revision unless bankruptcy ensued. It put attorneys, solicitors, and proctors in no worse position that it did some other classes of those having business with the debtor."

Especial importance must be ascribed to the use of the words "the incipient stage of bankruptcy" and "during that critical period", all pointing to the assistance which the debtor requires *prior* to the filing of the petition.

In *Wood* v. *Henderson*, at page 253, the Court crystallizes the purpose of the statute:

> "Section 60d is *sui generis*, and does not contemplate the bringing of plenary suits for the recovery of preferential transfers in another jurisdiction. It recognizes the temptation of a failing debtor to deal too liberally with his property in employing counsel to protect him in view of financial reverses *and probable failure*. It recognizes the right of such debtor to have the aid and advice of counsel and, in contemplation of bankruptcy proceedings which shall strip him of his property, to make provisions for reasonable compensation to his counsel. And, in view of the circumstances, the act makes provision that the bankruptcy court administering the estate may, if the trustee or any creditor question the transaction, re-examine it with a view to a determination of its reasonableness."

It is submitted that the language referring to protection

against "probable failure" indicates that the services contemplated by the statute must in part consist of attempts to avoid the anticipated failure.

This Court has indicated in the *Wood* case the special purpose for which this statute was enacted (210 U. S. 251):

> "Section 60d added a feature to the bankruptcy act not found in former acts regulating practice and procedure in bankruptcy; therefore adjudications upon other provisions of the bankruptcy act, or concerning the judiciary act giving jurisdiction to the courts of the United States, have no binding effect in the construction of this section."

At page 258 of the same opinion, Mr. Justice Day held:

> "This section in effect confers a special jurisdiction in a bankruptcy proceeding; it is only available when property has been transferred in contemplation of the filing of a petition in bankruptcy. When the affairs of one about to be adjudicated a bankrupt are in that situation, then the act, recognizing the right of the bankrupt to legal services to be rendered, undertakes to prevent the diminution of the estate to be administered and distributed for the benefit of creditors beyond a fair provision for counsel under such circumstances. To the extent that the provision is unreasonable the transfer is not given the effect to separate the property from the bankrupt's estate. As to this excess, the estate comes, within the meaning of the bankruptcy act, within the jurisdiction of the court, and will be ordered to be restored and administered for the benefit of creditors."

The decision in this case, therefore, turns upon the facts here presented. The Referee has made a finding that the services were rendered "in contemplation of bankruptcy". His decision has been in turn affirmed by the district and

circuit court. No reason appears for any interference with that conclusion, in view of the above indicated purpose of the statute.

Circuit Judge A. N. Hand, writing for the Second Circuit in *Re Falk*, 30 F. (2d) 607, (C. C. A. 2), has stated the purpose of §60-d as follows (p. 609):

> "The object of section 60-d was to afford the bankrupt representation by counsel, who would not have to take chances as a general creditor, but might know that a reasonable fee was assured, and hence would be zealous to render active service in what is often a difficult situation. *It also safeguarded the estate by enabling the trustee to secure a summary re-examination of the propriety of any fee paid.*"

Petitioners insist they were retained not in contemplation of bankruptcy, but to prevent that very result—their sole alleged function being to effect a settlement or an extension. Accepting their claim we have but to examine the authorities cited to conclude that the law is logical, and readily infers that when a man offers a settlement, bankruptcy although not the desideratum, is something which may normally follow.

Considerable emphasis is placed in petitioner's brief upon the fact that the services rendered must be "germane" to the aims of the Bankruptcy Act. With this proposition, the Trustee takes no issue and submits that an attempt to negotiate with creditors to effect a settlement is not inconsistent with the aims and purposes of the Bankruptcy Act, which itself provides for accomplishing that very result (see §12, 11 U. S. C. A. 30, regulating compositions).

In addition to objecting to the jurisdiction of the court to entertain this application, the petitioners who are ostensibly appearing only for a special purpose at the same time moved to strike out certain allegations of the petition, claiming irrelevancy (fol. 12). It is submitted that they

must adopt one position or the other, but waiving technical considerations, their position is demonstrated by their brief as without validity in fact or in law.

In extenuation of the allegations made in the petition, the court is referred to *Tripp* v. *Mitschrich*, 211 Fed. 424, (C. C. A. 8), cited by petitioners. In that case the court pointed out that the question of whether the transfer was "in contemplation of bankruptcy" depended upon a determination of "human motive" and therefore, resort must be had to "the surrounding circumstances".

The court held at page 428:

> "With this as the meaning of section 60d, there simply remains for determination in a given case whether this state of mind existed and actuated in the transfer involved. In ascertaining such, as in determining all human motive, we enter upon a domain where circumstances must usually be relied upon for enlightenment. True, the express statement of the party in making the transfer may afford direct evidence of the actuating thought. But more ordinarily this is to be ascertained from the surrounding circumstances. Or in still other cases it is to be determined by reasoning back from what he did to what he must have had in mind in so doing."

In view of this decision the Trustee, to give the court below a complete picture, indicated certain salient facts which conclusively establish that the bankrupt's business was on the brink of disaster. It was admittedly in difficulties and unable to meet its obligations.

On October 23, 1930, Mr. Pratt, an attorney, was retained to effect a settlement at an agreed retainer of $2,000 of which he was immediately paid $750.00 on account. Between October 1st and November 5th David Bell, the president of the company, withdrew from the business for his own use and benefit $1,500, and between October 23rd and November 11th, his brother, an employee of the company, with

drew $750.00 and on November 3rd petitioners were paid $2,500 by transferring a check of an account receivable of the company since the bank balance was only nominal.

It is a familiar experience in cases of this type for officers of the company, "insiders" and relatives to begin making substantial withdrawals after an attorney has been retained to effect a settlement and it is common knowledge that the situation is thus being prepared in contemplation of what may thereafter happen, among which possibilities the circumstance of bankruptcy is not unduly remote.

Tripp v. *Mitschrich* relied on by petitioners, involved a case in which the court held that the retention was not in contemplation of bankruptcy, for in that situation the company's physical assets had been wiped out by a fire and an attorney had been specially retained on a contingent basis to recover on a fire insurance policy for the loss. That situation admittedly negatived the possibility of bankruptcy. There moreover was never a transfer of property by the bankrupt to the attorneys, counsel in that case merely receiving a contract to be reimbursed to the extent of thirty per cent. of any recovery realized by them on the fire loss.

Petitioners elaborate at great length upon the fact that debtor was not insolvent. It is submitted that there are various degrees of insolvency. Under the law of the State of New York, inability to meet maturing obligations rendered the company insolvent (see *Davis* v. *Seneca Falls Mfg. Co.* (1927), 17 F. (2d) 546, (C. C. A. 2).

Emphasis is placed upon the fact that a balance sheet as of September 30, 1930 (p. 11) established solvency. No figures are advanced, however, to establish the condition as of the date of counsel's retention more than a month later. Nor is explanation suggested for the depletion of the $6,000 cash available on the September balance sheet by payment to officers for *back salaries* in October and November of $2,250. No reason is assigned for the retention of Mr. Pratt

at an agreed retainer of $2,000, of which $750 was paid on account, nor for the unusual procedure of selling merchandise and turning over to Conrad the purchaser's check of $2,500. It is fair to suggest that the manner of emptying the $6,000 bank account, instead of paying creditors, resulted in what petitioners' brief (p. 10) describes as "the ill advised act of a small group of creditors" who filed the petition.

Conrad testified (p. 28, fol. 44) that the assets and liabilities were equal; if the company were solvent the margin of safety was very slight.

It is, however, significant that this corporation, supposedly solvent as it is here claimed, when the petition was filed, with its affairs in the hands of counsel who had been paid $2,500, took no steps to oppose the involuntary petition by denying the allegations or filing an answer claiming solvency, action which counsel might have taken for the company if the prospect of settlement were as favorable as is claimed. It is apparent from an examination of the date of the petition, November 17, 1930 and the date of the adjudication, four days later, November 21, 1930 (fols. 6, 7), that the company was adjudicated a bankrupt *on consent* since under § 18-b of the Bankruptcy Act, the time to plead to the petition could not have expired. Petitioners suggest (p. 10): "The petition herein was filed by certain creditors for reasons which we are unable to understand", and at page 10 of their brief, it is charged that the bankruptcy was the ill considered "act of a small group of creditors". Significantly creditors did not oppose the bankruptcy by filing an answer as is their privilege under § 18-b (11 U. S. C. A. 41-b).

As of the date of the petition, there can therefore be no question that the company was insolvent for certainly during the two weeks interval between petitioners' retention and the filing of the petition, no great change in affairs occurred to convert David Bell Scarves, Inc. into an insolvent condition, which had already existed for some time prior.

Petitioners are endeavoring to oust the Referee of jurisdiction. It is submitted that this attempt should not be countenanced, since it would be repugnant to the spirit and purpose of the statute, in view of the circumstances of this case and in addition would be fraught with the possibilities of creating a dangerous precedent. If petitioners are successful in their contention, every attorney who receives an exorbitant fee shortly before petition date, need but come into this Court and announce through himself or his client that he was retained not in contemplation of bankruptcy but for the purposes of negotiating a settlement, with the result that the bankruptcy court in such cases will be automatically deprived of its summary powers, and a new way opened to extract assets which are the property of creditors.

The entire scope and spirit of the administration of the Bankruptcy Act is to insure the keeping down of administration expenses to a reasonable minimum. For that purpose the district courts have promulgated special rules. This Court has enacted general orders with the same end in view (see General Orders 42-44).

Under General Order 38 in prescribing a set of forms in bankruptcy, 174 U. S. 1194 at page 1204, this Court has directed that bankrupts shall under oath make special answer to this inquiry: "What sum or sums have been paid to counsel, and to whom, for services rendered or to be rendered in this bankruptcy." The purpose of this query is to lay the foundation for proceedings under the statute now before the Court. To sustain or in anywise recognize the position of petitioners will mark a complete and radical departure from the liberal construction thus far given this particular section.

The discussion by petitioners and the authorities cited in connection therewith as to the distinction between §60-d and §64-b, 3 (11 U. S. C. A. 104b, 3), are not material, since all of the services in question were rendered *prior* to the bankruptcy.

Cases construing the latter section which deals only with applications for allowance for services in bankruptcy therefore have no application.

For the same reason reference to *Randolph* v. *Scruggs*, 190 U. S. 533, is beside the point; that case in no wise involved the section in question. It dealt with an application for an allowance filed under §64b, 3 by an attorney for an assignee who had the temerity to claim priority for services rendered in *contesting* an adjudication in bankruptcy. Mr. Justice Holmes held (190 U. S. 540):

> "No ground appears for allowing the item for services in resisting an adjudication in bankruptcy."

In re Geller, 216 Fed. 558 (D. C. N. J.), stressed by petitioners (p. 13) likewise has no application, the opinion itself in that case indicating that (216 Fed. 562) "the referee did not presume to act under Section 60d".

CONCLUSION.

It is respectfully submitted that the petitioners have shown no reason in law or in fact which would justify this Court in disturbing the decisions of the three courts below.

Respectfully submitted,

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SYDNEY KRAUSE,
GEORGE J. HIRSCH,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 718.—October Term, 1932.

Conrad, Rubin & Lesser, Petitioners,
vs.
Horace G. Pender, Trustee in Bankruptcy.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[May 29, 1933.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

By an order made by a referee in bankruptcy under section 60 (d) of the Bankruptcy Act (11 U. S. C., 96 (d)), appellants were directed to turn over to the trustee in bankruptcy the sum of $2,000 which was part of an amount paid to them by the bankrupt corporation for legal services rendered shortly before the filing of an involuntary petition. The order was sustained by the District Court (*In re David Bell Scarves, Inc.*, 52 F. (2d) 755) and by the Circuit Court of Appeals. 61 F. (2d) 771. This Court granted certiorari. 288 U. S. —.

The only question presented is raised by the appellants' challenge of the jurisdiction of the referee to reexamine the payment under section 60 (d). The payment was made on November 5, 1930, and the petition in bankruptcy was filed twelve days later. There is no room for controversy as to the facts which are thus stated by the Court of Appeals: The corporation was in financial difficulties and unable to meet its maturing obligations. Prior to retaining the appellants, it had engaged another attorney to negotiate a settlement with its creditors, and a meeting with some of its creditors had been held. Apparently the appellants were retained to supplement the efforts of that attorney, to whom $750 had already been paid upon a promised fee of $2,000. The testimony of one of the appellants, given at an examination under section 21a, was to the effect that he was to negotiate with creditors for a 50 per cent cash settlement and was to assist the corporation in hypothecating its accounts receivable in order to obtain the necessary money to carry out such a settlement. His affidavit, submitted

in opposition to the referee's jurisdiction, stated that the most extreme course which was within the contemplation of himself and David Bell, bankrupt's president, was continuance of the business under an equity receivership, although that course was not contemplated if the business could be continued under the supervision of a committee of creditors or of a representative of the New York Creditors' Adjustment Bureau, Inc. It also appeared that within two weeks prior to November 5th, when the appellants' retainer was paid, David Bell had withdrawn $1,500 from the corporation, and his brother, an employee, had withdrawn $750. The cash resources of the corporation were so low that appellants' retainer could not be paid until a sale of merchandise was made, and the purchaser's check for $2,500 was then indorsed to appellants.

The District Court concluded that the thought of bankruptcy was the impelling motive of the debtor corporation when its president retained appellants. And the Court of Appeals was of the opinion that in these circumstances the payment was made "in contemplation" of bankruptcy within the meaning of section 60 (d).[1]

That provision has been held to be *sui generis*. It does not contemplate a plenary suit, but a summary proceeding. *In re Wood and Henderson*, 210 U. S. 246, 251-253. The class of cases to which it refers is not that of preferences or of fraudulent conveyances. *Id.* The provision authorizes re-examination of payments or transfers when made by a debtor (1) "in contemplation of the filing of a petition by or against him," (2) "to an attorney and counselor at law, solicitor in equity, or proctor in admiralty", and (3) "for services to be rendered". Such payments or transfers are only to "be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate".

[1]Section 60 (d) provides as follows: "(d) If a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney and counselor at law, solicitor in equity, or proctor in admiralty for services to be rendered, the transaction shall be re-examined by the court on petition of the trustee or any creditor and shall only be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate".

The language of the provision, and the indicated scope of the legal services embraced within it, distinguish it from the provision of section 64b (3) (11 U. S. C., 104 (b) (3)),[2] with respect to the priority of a reasonable attorney's fee in the distribution of an estate in bankruptcy.[3] See *Furth* v. *Stahl*, 205 Pa. St. 439, 442; *Pratt* v. *Bothe*, 130 Fed. 670, 673. Section 60 (d) relates to payments and transfers made by the bankrupt prior to bankruptcy from his own property for services to be rendered to him; section 64b (3) to an allowance to be made for legal services out of the estate under administration. See *In re Rolnick*, 294 Fed. 817, 819. The services within the latter provision are those rendered in aid of the administration of the estate and the carrying out of the provisions of the Act. See *Randolph* v. *Scruggs*, 190 U. S. 533, 539; *In re Kross*, 96 Fed. 816; *In re Mayer*, 101 Fed. 695; *In re Rosenthal & Lehman*, 120 Fed. 848; *In re Christianson*, 175 Fed. 867. Section 60 (d), authorizing a reexamination of payments and transfers by the bankrupt for services to be rendered, has a broader scope. It contains no intimation of an intention to limit the jurisdiction to reexamine to a particular sort of legal services for the payment of which the debtor has disposed of his property. The point of the provision conferring jurisdiction for a summary reexamination is not the specific nature of the legal services to be rendered but that the payment or transfer to provide for them is made "in contemplation" of bankruptcy. The purpose is shown by the sweeping description of payments or transfers "to an attorney and counselor at law, solicitor in equity, or proctor in admiralty".

We agree with the Court of Appeals that the criteria of jurisdiction to reexamine are distinct from the criteria of the decision on the merits. As to the jurisdiction to reexamine, the controlling question is with respect to the state of mind of the debtor and

[2]Section 64b (3) provides: "(b) The debts to have priority, except as herein provided, and to be paid in full out of bankrupt estates, and the order of payment shall be . . . (3) the cost of administration, . . . and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases as the court may allow";

[3]Cf. In re Kross, 96 Fed. 816, 818, 819; In re Habegger, 139 Fed. 623, 627; In re Christianson, 175 Fed. 867, 868; In re Secord, 296 Fed. 231, 232.

whether the thought of bankruptcy was the impelling cause of the transaction. Compare *United States* v. *Wells*, 283 U. S. 102, 117, 118; *Tripp* v. *Mitschrich*, 211 Fed. 424, 427. If the payment or transfer was thus motivated, it may be reexamined and its reasonableness be determined. Undoubtedly, while the question thus relates to the debtor's motive, the nature of the services which he seeks and for which he pays may be taken into consideration as it may throw light upon his motive. It is not impossible that the services may have been so wholly separate from any exigency of bankruptcy as to indicate that the thought of bankruptcy was in no sense controlling. But, given the fact that the payment or transfer was in contemplation of bankruptcy, the inducement of the transaction affords, from the standpoint of the statute, sufficient ground for authorizing a summary inquiry into its reasonableness. The manifest purpose of the provision is to safeguard the assets of those who are acting in contemplation of bankruptcy, so that these assets may be brought quickly and without unnecessary expense into the hands of the trustee, and to provide a restraint upon opportunities to make an unreasonable disposition of property through arrangement for excessive payments for prospective legal services. *In re Wood and Henderson, supra; Pratt* v. *Bothe, supra.* We said in the case of *Wood and Henderson* that the statute "recognizes the temptation of a failing debtor to deal too liberally with his property in enabling counsel to protect him in view of financial reverses and probable failure. It recognizes the right of such a debtor to have the aid and advice of counsel, and, in contemplation of bankruptcy proceedings which will strip him of his property, to make provisions for reasonable compensation to his counsel. And in view of the circumstances the Act makes provision that the bankruptcy court administering the estate may, if the trustee or any creditor question the transaction, reexamine it with a view to a determination of its reasonableness".

In this view, we are unable to conclude that the question whether the services for which the payment or transfer is made are "germane to the aims of the Bankruptcy Act", as suggested in some of the decisions,[4] furnishes the test of the jurisdiction to

[4]See In re Habegger, 139 Fed. 623; In re Stolp, 199 Fed. 488; In re Rolnick, 294 Fed. 817; In re Lang, 20 F. (2d) 239; Quinn v. Union National Bank, 32 F. (2d) 762.

reexamine. The test of jurisdiction, we repeat, is given by the express language of the statute. In the exercise of jurisdiction, all questions bearing upon the reasonableness of the transaction, including the purpose and nature of the services, are open to consideration. But it is insisted, in the instant case, that the payment to appellants could not properly be regarded as made in contemplation of bankruptcy, and hence within the jurisdiction to reexamine, because the payment was for the purpose of engaging appellants to conduct negotiations with creditors in order to arrange for an extension of time, and, if necessary, for the operation of the business under the creditors' supervision, and thus to avoid a forced liquidation and ultimately to restore the business to a sound basis. We find no ground for saying that the fact that such purposes were in view establishes, as matter of law, that the payment was not in contemplation of bankruptcy. On the contrary, negotiations to prevent bankruptcy may demonstrate that the thought of bankruptcy was the impelling cause of the payment. "A man is usually very much in contemplation of a result which he employs counsel to avoid". *Furth* v. *Stahl*, *supra*. See, also, *In re Klein-Moffett Co.*, 27 F. (2d) 444; *Slattery* v. *Dillon*, 17 F. (2d) 347; *In re Lang*, 20 F. (2d) 239.

We are of the opinion that the court had jurisdiction to make the order under review.

Order affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.